FILE COPY

Office-Supreme Court, U.S.
FILED
AUG 26 1959
JAMES R. BROWNING, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 52

JOSE TERRONES RIOS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

CLORE WARNE
6535 Wilshire Boulevard
Los Angeles 48, California
Counsel for Petitioner

Of Counsel:
HARVEY M. GROSSMAN

INDEX

SUBJECT INDEX

	Page
BRIEF FOR THE PETITIONER	
Opinion Below	1
Grounds of Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Questions Presented	2
Statement of the Case	2
A. Arrest, Search and Seizure	2
B. State Court Proceedings	9
C. Federal Court Proceedings	10
Summary of Argument	14
Argument	15
I. The Evidence Upon Which Petitioner Was Convicted Was Obtained in Violation of His Constitutional Rights	15
A. The Evidence Upon Which Petitioner Was Convicted, Having Been Obtained by State Police in Violation of State Law, Was Indelibly Tainted and Should Not Be Admitted in a Federal Court	15
B. The Search and Seizure of the Evidence in Question Was in Clear Violation of the Constitutional Standards Established by This Court	16
C. The Search and Seizure in the Instant Case May Not Be Justified as Incident to a Lawful Arrest	28
1. In determining the lawfulness of an arrest without warrant, the courts will look to state law insofar as that law comports with federal constitutional standards	28

Page

2. The search and seizure in the instant case were not incident to any lawful arrest under California law 28

II. The Mere Fact That the Unlawful Search and Seizure in the Present Case Was Conducted by State Officers Does Not Preclude Application of the Exclusionary Rule 39

Preliminary Statement 39

A. The "Silver Platter" Doctrine Has Not Been Adopted by This Court 39

B. The "Silver Platter" Doctrine Has Been Rejected by the Better Reasoned Cases in the State Courts 40

C. Adoption of the "Silver Platter" Doctrine Would Be Irreconcilable With the Holding of This Court in *Wolf* v. *Colorado* 46

D. Application of the "Silver Platter" Doctrine to Evidence Unlawfully Seized by State Officers in an "Exclusionary Rule" State Would Undermine the Effectiveness of That State's Exclusionary Rule, Contrary to the Common Federal-State Policy 52

E. The "Silver Platter" Doctrine Would Be Unworkable 55

Conclusion 56

Appendix A. Value and Importance of the Exclusionary Rule 57

Appendix B. Background and Effect of the California Exclusionary Rule 74

1. Circumstances Leading to California's Adoption of the Exclusionary Rule 74

2. Effect of the California Exclusionary Rule 80

Appendix C. Constitutional and Statutory Provisions 83

Table of Authorities Cited

Page

Cases:

Badillo v. *Superior Court*, 26 Cal. 2d 269, 294 P. 2d 23 (1956) 34
Benanti v. *United States*, 355 U.S. 96 (1957) 40, 54
Brinegar v. *United States*, 338 U.S. 160 (1949) 17, 19, 20, 27
Byars v. *United States*, 273 U.S. 28 (1950) 39
Carroll v. *United States*, 267 U.S. 132 (1925) 17
Costello v. *United States*, 255 F.2d 389 (C.A. 8, 1958) 40
Erie R. Co. v. *Tompkins*, 304 U.S. 64 (1938) 28
Fidelity Union Trust Co. v. *Field*, 311 U.S. 169 (1940) 28
Gascon v. *Superior Court*, 169 A.C.A. 367, 337 P.2d 201 (1959) 34
Hanna v. *United States*, 260 F.2d 723 (D.C. 1958) 40, 48
Johnson v. *United States*, 333 U.S. 10 (1948) 17, 22, 28
Jones v. *United States*, 217 F.2d 381 (C.A. 8, 1954) 52
Little v. *State*, 171 Miss. 848 (1924) 41, 44
Lustig v. *United States*, 338 U.S. 74 (1949) 40
Nueslein v. *District of Columbia*, 115 F.2d 690 (1940) 72
Olmstead v. *United States*, 277 U.S. 438 (1928) .. 15, 16
Parker v. *United States*, 183 F.2d 268 (C.A. 9, 1950) 52
People v. *Blodgett*, 46 Cal. 2d 114, 293 P.2d 57 (1956) 36
People v. *Brown*, 45 Cal. 2d 640, 290 P.2d 528 (1955) 30
People v. *Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955) 68, 74
People v. *Gale*, 46 Cal. 2d 253, 294 P.2d 13 (1956) 31, 33
People v. *Goodo*, 147 Cal. App. 2d 7, 304 P.2d 776 (1956) 31
People v. *Harris*, 146 Cal. App. 2d 142, 304 P.2d 178 (1956) 31, 32
People v. *Harvey*, 142 Cal. App. 2d 728, 299 P.2d 310 (1956) 36

Page

People v. *Kilvington*, 104 Cal. 86, 37 Pac. 799 (1894) 31
People v. *Martin*, 46 Cal. 2d 106, 294 P.2d 52 (1956) 36
People v. *Rodriguez*, 140 Cal. App. 2d 865, 296 P.2d 38 (1956) 36
People v. *Sanders*, 46 Cal. 2d 247, 294 P.2d 10 (1956) 31, 34
People v. *Simon*, 45 Cal. 2d 645, 290 P.2d 531 (1955) 31, 32
Ramirez v. *State*, 123 Tex. Crim. 254, 58 S.W.2d 829 (1933) 41
Rea v. *United States*, 350 U.S. 214 (1956) 57
Rios v. *United States*, 256 F.2d 173 (C.A. 9, 1958) 40
Serio v. *United States*, 203 F.2d 576 (C.A. 5, 1953) 40
State v. *Arregui*, 44 Ida. 43, 254 Pac. 788, 52 A.L.R. 463 (1927) 41, 44
State ex rel. Kuhr v. *District Court*, 82 Mont. 515, 268 Pac. 501 (1928) 41
State v. *Hiteshew*, 42 Wyo. 147, 292 Pac. 2 (1930) 41
State v. *Rebasti*, 306 Mo. 336, 267 S.W. 858 (1924) 41, 42
United States v. *Di Re*, 332 U.S. 581 (1948) 17, 21, 28
United States v. *Irvin*, 86 F.Supp. 362 (W.D. Ark. 1949) 25
United States v. *Stirsman*, 212 F.2d 900 (C.A. 7, 1954) 52
Walters v. *Commonwealth*, 199 Ky. 182, 250 S.W. 839 (1923) 41, 44
Weeks v. *United States*, 232 U.S. 383 (1914) 39
Wirin v. *Horrall*, 85 Cal. App. 2d 497, 193 P.2d 470 (1948) 31, 34
Wolf v. *Colorado*, 338 U.S. 25 (1949) 46, 63

STATUTES:

United States Constitution 83
21 U.S.C. Section 174 83
California Health and Safety Code, Section 11500 84
Penal Code, Section 836 29

Page

MISCELLANEOUS:

50 A.L.R. 2d 531 47
Barrett, Exclusion of Evidence Obtained by Illegal Searches—A Comment on *People* v. *Cahan*, 43 Cal. L. Rev. 565 (1955) 78
Admissibility in Federal Courts of Evidence Obtained Illegally by State Authorities, 51 Col. L. Rev. 128 (1951) 47
Judson A. Parsons, Jr., State-Federal Crossfire in Search and Seizure and Self Incrimination, 42 Corn. L.Q. 346, 348 (1957) 41, 53
Osmond K. Fraenkel, Recent Developments in the Federal Law of Searches and Seizures, 33 Ia. L. Rev. 565 (1955) 62
Monrad G. Paulsen, Safeguards in the Law of Search and Seizure, 52 N.W. L. Rev. 65 (1957) 60
9 Stanford L. Rev. 538 80
Judicial Control of Illegal Search and Seizure, 58 Yale L.J. 144 (1948) 57

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 52

JOSE TERRONES RIOS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF

Opinion Below

The opinion of the Court of Appeals for the Ninth Circuit (R. 166-175)[1] was filed May 26, 1958, and is reported at 256 F. 2d 173.

Grounds of Jurisdiction

The Judgment of the Court of Appeals for the Ninth Circuit, affirming the Judgment below, was filed and entered May 26, 1958, and the Petition for Certiorari herein

---

[1] The Record will be indicated by the letter "R" followed by appropriate page numbers. Petitioner will sometimes herein be designated as defendant.

was filed on June 14, 1958. Jurisdiction of this Court upon certiorari is based upon 28 *U.S.C.*, § 1254(1).

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved are:

United States Constitution, Fourth, Fifth, and Fourteenth Amendments, 21 *U.S.C.*, Section 174; *California Health and Safety Code*, Section 11500.

Each of the foregoing provisions is set forth in Appendix C to this Brief.

Questions Presented

1. Independently of the state court's determination, was the evidence used against petitioner in the federal prosecution obtained in violation of his rights under the Constitution of the United States?

2. If the evidence was unlawfully obtained, was such evidence admissible in the federal prosecution of petitioner because it was obtained by state officers without federal participation?

Statement of the Case

A. Arrest, Search and Seizure.

On February 18, 1957, plainclothes (R. 56-57) officers D. W. Beckman and Beverly P. Grace, assigned to the Juvenile Division of the Los Angeles Police Department, saw defendant enter a taxicab in the vicinity of First and Flower Streets in the City of Los Angeles, California (R. 6-8) at approximately 10 p.m. They followed the cab

in an unmarked car (R. 56) for some two miles (R. 6-8), though they had not seen defendant commit any offense and were not searching for a participant in any known crime. In fact, they had no idea at all as to the identity of the defendant, and no information whatever concerning the defendant, the cab driver, or the cab.[2] They subsequently pulled up behind the cab (R. 13) when it stopped at a signal[3] to see if they would be able to find any narcotics in defendant's possession[4] (R. 65).

---

[2] Officer Beckman testified as follows (R. 14-15):

"Q. You had no prior information concerning this defendant or the cab driver prior to stopping the cab?

"A. That's right, sir.

"Q. You had no prior information, confidential informant or otherwise, as to narcotics?

"A. As to the defendant or the cab?

"Q. Yes.

"A. That's right.

"Q. You had never seen this defendant before, had you?

"A. No sir."

Beckman further testified that of twenty-two narcotic arrests he had made preceding the arrest of the defendant, only one had been made of an occupant of a yellow cab, this being some three months prior to the arrest in question (R. 12).

[3] The cab was in the double lane next to the center line of the highway (R. 13).

[4] Beckman's testimony in this regard was as follows (R. 65):

"Q. Well, in stopping behind the cab and then approaching the cab, as you have related, is it not a fact your intention was to see if you could locate any, what I think you referred to as, stuff or narcotics in the possession of the defendant? Was that not your purpose at that time? That is, you testified you were investigating narcotics, and the question I am asking you is, was not your purpose in following the cab, stopping behind it and approaching the cab, to see if you would be able to uncover any narcotics in the possession of the defendant? Was that not your object?

"A. Yes.

"Q. And that was not your object prior to the time you testified that you saw anything on the floor of the taxicab, or an object dropped on the floor? This was the purpose with which

The two officers alighted and approached on opposite sides of the cab (R. 7-8, 19, 67-68, 80, 132), although neither had a search warrant or an arrest warrant. Officer Beckman, who approached on the right, identified himself to the driver and defendant (R. 7-8, 56-57). In the succession of events which followed, a package was seized by the officers which, upon subsequent analysis, was found to contain heroin. In an arrest report filed shortly thereafter, Officer Beckman described the sequence of events as follows (R. 85-86, 150):

> "When Officer Beckman identified himself to arrestee, arrestee reached inside his right jacket pocket extracting a white object. When arrestee did this Officer

---

you approached the cab at that time, is that not correct, Officer Beckman?

"A. The purpose was, I thought he possibly had narcotics in his possession."

Beckman's purported justification of his actions was as follows (R. 14-15):

"What information did you have that would lead you to believe that there was narcotics either concealed in the cab or on either the passenger or the driver of the cab at that particular point?

"A. By the defendant's actions in the place where I first observed him and the known locality.

"Q. You mean because somebody got into a cab this aroused your suspicion?

"A. His manner of getting into the cab.

"Q. Well, did he get in in an unusual manner?

"A. Yes.

"Q. Describe how he got into the cab.

"A. The cab was parked on the parking lot. The defendant walked out to the lot, walked over to the sidewalk, looked northward on Flower and south on Flower and down First Street. He looked in that direction. Then he walked back. After walking around on the parking lot he walked back and then got in to the cab."

Beckman testified that the area adjacent to the Los Angeles Civic Center where defendant was seen entering the taxicab had a poor reputation, in the officer's opinion, from the standpoint of narcotics enforcement (R. 54).

Beckman opened the cab door and observed the arrestee drop the object to the floor by his feet.

"Arrestee attempted to alight from the cab. At this time Officer Beckman attempted to retrieve the object dropped on the floor. Officer could see at this time that the object was a rubber condom containing a large quantity of powdery substance which resembled heroin. Officer Beckman then informed arrestee he was under arrest for suspicion of narcotics."

The package was seized by the arresting officers and upon subsequent analysis was found to contain heroin[5] (R. 8-9).

During his testimony in the District Court, many months after the events in question, Officer Beckman recalled the sequence of events somewhat differently. This time he stated that he saw the defendant drop the object before the door of the cab was opened and suggested that defendant participated in the opening of the cab door (R. 64). Defendant's efforts to cross examine Beckman with respect to the changes in his story were met with objections by the trial court itself (R. 84-86).

A more detailed account of the foregoing events was given by another of the Government's witnesses, Granville McCready Smith, the driver of the Yellow Cab in which defendant was riding. Mr. Smith's testimony was as follows (R. 109-112):

---

[5] Officer Beckman testified that he first found out that the package contained heroin after Policewoman Grace gave him the object (R. 75). While Officer Beckman testified that contraceptives were often used to carry narcotics, Policewoman Grace testified that during the six-month period in which she had been assigned to the area in question this was the first time she had seen a contraceptive used to carry narcotics (R. 78).

"The Witness: Well, I first saw Officer Beckmann at the intersection of First and State Streets when I was waiting for a traffic signal.

"Now, prior to that time what I was doing, I was driving eastwardly on First Street.

"The Court: How did you happen to stop at First and State Streets?

"The Witness: I stopped for a red light.

"The Court: Was there a car ahead of you?

"The Witness: No, I was in the center lane straddling the street car tracks.

"By Mrs. Bulgrin:

"Q. Was there other traffic there, do you recall or not?

"A. Well, I didn't notice. There wasn't any going the same direction that we were in that block. Whether there were cars facing the other way waiting for the signal, I don't recall. I didn't notice.

"Q. When did you first see Officer Beckmann that evening?

"A. When I was waiting for the traffic signal at First and State.

"Q. Was the light red at that time?

"A. Yes.

"Q. Will you just tell us in your own words, Mr. Smith, what happened immediately after the time you saw Officer Beckmann?

"A. Well, he appeared alongside my taxicab on the right-hand side opposite the front window on the right holding a flashlight in his right hand, I believe, and his billfold in his left.

"The windows on the cab, that is, the front window at any rate, was rolled up, and if he was saying anything to me I couldn't hear, but he gestured with his

flashlight, I believe, toward his billfold and I got the idea that he was policeman.

"Q. He wasn't in uniform at the time?

"A. No. And I didn't see a badge. I merely saw his billfold that he was holding in his hand.

"The Court: Then what happened?

"The Witness: Then I believe he turned toward the defendant who was riding in the back of the cab and I think he motioned with his billfold toward the defendant and he opened the door. Now somewhere along in here I think Beckmann disposed of his flashlight. I didn't notice exactly what happened there.

"By Mrs. Bulgrin:

"Q. What did the defendant do? What was happening as far as the defendant was concerned?

"A. Well, he appeared to be becoming quite agitated.

"Q. While he was inside the cab?

"A. While he was inside the cab, yes.

"Q. When the door opened did he get out?

"A. Well, there are other events before he got out.

"The Court: What were they?

"The Witness: Well, I am trying to get these in the right order. It is difficult because things happened quickly.

"The Court: Yes?

"The Witness: Officer Beckmann—

"The Court: Did you see Policewoman Grace?

"The Witness: Not at that time.

"The Court: Go ahead.

"The Witness: Officer Beckmann opened the door and I asked him who he was, that is, he opened the rear door of the taxicab and he said, 'We are police officers.' I just wanted to satisfy my own mind about that. I didn't know whether he was a policeman or a

hijacker positively, but I thought that he was a policeman but I wanted to be sure. So he said, 'We are police officers.'

"I thought probably it was just a routine examination. I work the night shift, have for some time, and I have been stopped by the police and they have checked the occupants of my cab. There have been quite a few holdups of taxi drivers and I just thought it was a routine thing.

"But the defendant was getting quite agitated and I noticed at this time that Officer Beckmann had his revolver drawn, which seemed to me somewhat extraordinary just to stop and question an occupant of a cab, and said something to the effect that you are scaring him, what is the big idea, something like that. I don't remember my exact words.

"As I recall then Officer Beckmann took the defendant by the arm—

"By Mrs. Bulgrin:

"Q. That was after the defendant got out of the cab, is that correct?

"A. It was my impression that Officer Beckmann took hold of the defendant's arm while he was still in the cab.

"Q. That is just your impression?

"A. The defendant was sitting right next to the door on the right-hand side in the back seat, and I didn't hear what Officer Beckmann said to the defendant.

"Q. During the time these events, Mr. Smith, were happening, in which direction were you facing?

"A. Well, I was facing toward the defendant and Officer Beckmann. I turned my head to see what was going on.

"Q. You turned your head to the right, is that correct?

"A. Yes.

"Q. Did you watch the proceedings as they transpired?

"A. Yes.

"The Court: How could you tell the defendant was agitated?

"The Witness: Well, it is a rough impression but I was sufficiently impressed with the fact at the time to protest to Officer Beckmann that he was frightening him, and as far as I knew there was no good cause to be frightening him with a drawn revolver. Maybe it was me who was agitated."[1]

B. State Court Proceedings.

Following defendant's arrest by the Los Angeles Police, criminal proceedings were instituted against him in behalf of the People of the State of California, charging him with a violation of Section 11500 of the *California Health and Safety Code*[2] which prohibits, *inter alia*, possession of narcotics.

On March 12, 1957, a preliminary hearing was had in the state court at which the only testimony, aside from that of an expert witness who identified a white powder as heroin, was that of the arresting officers, Beckman and Grace (R. 5-23).

On May 10, 1957, the action came on for trial in the Superior Court of the State of California, in and for the

[1] Smith testified that after defendant got out of the cab he repeatedly protested his innocence (R. 113).

[2] For full text of the Statute, see Appendix C to this Brief.

County of Los Angeles, before the Honorable Walter H. Odemar. Trial was had solely on the reporter's transcript of the preliminary hearing. After considering the testimony of Officers Grace and Beckman as set forth in the preliminary transcript, and argument of counsel addressed thereto, Judge Odemar granted defendant's motion to suppress the package of narcotics on the ground that it had been illegally seized without a warrant, incident to an unlawful arrest, and thereupon rendered a judgment of acquittal (R. 22-24), commenting as follows with respect to the illegality of the arrest, search and seizure (R. 24):

> "I can't possibly see how this arrest could have originally been attempted under the information the officer very frankly tells us that he had. I don't think any reasonable man could think a felony had been committed because a man comes out of a building, looks up the street, and the other way on the street, then looks up First Street, then walks to an automobile in a parking lot, gets in a taxicab and drives away. What in the world there is in that, together with the fact it happens to be First and Hope or First and Flower—I forget which it is—and also that somebody else was arrested in a taxicab, when there are so many hundreds of taxicabs in this community, about three months before, just to state it shows the absurdity of it, insofar as I see, and your motion to suppress the evidence will be granted . . ."

C. Federal Court Proceedings.

Following Judge Odemar's acquittal of defendant in the State Court, Officer Beckman, after consulting his superiors, enlisted the aid of the federal narcotics authorities (R. 50-51, 60, 70, 71-72, 154). The manner in which Officer Beckman instituted the federal prosecution was described by him as follows (R. 50-51):

"Q. What occasioned the presentation of this case to the Federal grand jury after the ruling in the Superior Court across the street, Mr. Beckmann, in this particular case?

"A. After the ruling in the Superior Court, approximately a week or two weeks later, I conferred with my divisional commander, Captain Clavis, about the case, and at that time I showed him the arrest reports and discussed the case with him.

"He then called Captain Madden of the Narcotics Division of the Los Angeles Police Department. I then went over and talked to Captain Madden of the Los Angeles Police Department. Captain Madden then looked at the arrest report, and I discussed the case with him going to the Federal Narcotics to present the case.

"Q. Whose idea was that? Was that yours or Captain Madden's?

"A. Mine.

"Q. In other words, did you institute the discussion with Captain Madden?

"A. Yes. Captain Madden then called Federal Narcotics and I went over to Federal Narcotics and talked to Mr. Goven. At that time I showed him a copy of my arrest report and discussed the case with him."*

---

* Defendant's efforts to establish a pattern of cooperation between state and federal authorities encountered objection from the trial court itself (R. 60):

"Q. Officer Beckmann, have you ever turned over evidence in a narcotics case to the Federal officers prior to the arrest in this case?

"The Court: What is the materiality of that?

"Mr. Grossman: The Government on direct introduced evidence to show his overall course of dealing, as to whether he had any dealings with Federal officers, whether there was any participation.

On June 19, 1957, an indictment containing a single count was filed by the Federal grand jury for the Southern District of California, charging defendant with receiving, concealing and transporting illegally imported narcotics in violation of 21 U.S.C., Section 174 (R. 1).[9] Both the description of the alleged narcotic and the date of its concealment were identical with those testified to by Officers Beckman and Grace in the state court proceeding.[10]

Accordingly, on July 15, 1957, defendant moved to suppress the evidence in question on the ground that evidence obtained by state officers through illegal search and seizure may not be used in a federal court proceeding in an effort to circumvent the state exclusionary rule. The trial court denied defendant's motion, and in so ruling indicated, *inter alia*, that it considered itself bound by decisions of the Ninth

---

"The Court: In this case.

"Mr. Grossman: I think that a question of a course of—is material. One of the theories on which we are proceeding here would be that in doing this he was acting as an agent for the Federal authorities, and it is our position that this would be material to determine whether he was in the custom of gathering evidence for the Federal authorities, indicating for whom he was acting in this particular case.

"Mrs. Bulgrin: Your Honor, I think if he was not acting in behalf of the Government in this particular case, if he had been so acting, assuming for the sake of argument, in the past, in other cases, it would not be material.

"The Court: I do not think it would be material. Since I raised the objection myself, I will sustain the objection."

[9] The jurisdiction of the District Court was based upon 18 *U.S.C.*, Section 3231.

[10] Defendant appeared for arraignment on June 24, 1957; as he was without funds with which to retain counsel, counsel was appointed by the Court to assist with his defense. On July 1, 1957, defendant entered a plea of not guilty of the offense with which he was charged. The Government stipulated that it was seeking to try the defendant for the same possession, arising out of the same transaction, of which he had been acquitted in the state court proceedings (R. 32-33).

Circuit holding that evidence unlawfully obtained by state officers without federal participation was nevertheless admissible in a federal criminal prosecution[11] (R. 27, 98-99).

Following the District Court's denial of defendant's motion to suppress, the case came on for trial, the jury returned a verdict of guilty (R. 28) and the trial court imposed a sentence of *twenty years imprisonment, the maximum permitted by law* (R. 28).

The Government's primary evidence at the trial was the package allegedly seized from defendant and the testimony of Officers Beckman and Grace with respect to the events surrounding the seizure of it, the same evidence which the state court had held inadmissible in the prior state court proceedings and which the defendant had previously sought to have excluded. Defendant objected to the admission of this evidence, but his objection was overruled (R. 145) and a motion to acquit was denied (R. 162).

Following the judgment of the trial court, defendant appealed in due course to the Court of Appeals for the Ninth Circuit, which affirmed the judgment of the trial court (R. 175). Thereafter defendant filed in this Court a motion for leave to proceed *in forma pauperis* and a petition for certiorari. On April 20, 1959, this Court made its order granting defendant's petition for writ of certiorari as to the following questions (R. 176):

---

[11] In this regard the trial court observed (R. 98-99):

"But I think in this case that I am bound with respect to the decision by the State courts by the doctrines of the Parker case in 183 F.(2d), the Anderson case in 237 F.(2d), both Ninth Circuit cases, and the Lustig case in 338 U.S., all of which bear on the question and all of which have as the underlying philosophy that unless there is Federal participation shown then the search by the State officers, even though it be unlawful, does not permeate the Federal proceedings. For that reason I adhere to my ruling in that respect."

1. Independently of the state court's determination, was the evidence used against petitioner in the federal prosecution obtained in violation of his rights under the Constitution of the United States?

2. If the evidence was unlawfully obtained, was such evidence admissible in the federal prosecution of petitioner because it was obtained by state officers without federal participation?

Summary of Argument

Petitioner stands convicted on the basis of evidence unlawfully obtained in violation of his constitutional rights. The state courts expressly declined to receive this tainted evidence. The federal courts should be equally steadfast in refusing to sanction an unlawful search and seizure by admitting the evidence so obtained.

The fact that the unlawful search in the instant case was conducted by state officers does not suggest a contrary result. That the constitutional infringement is equally grave whether the unlawful search be conducted by state or federal officers can no longer be doubted. That the exclusionary rule affords the only effective safeguard yet devised to curtail such infringements is likewise free from doubt. Accordingly, the same considerations which led this Court to exclude evidence unlawfully seized by federal officers likewise compel the exclusion of evidence unlawfully seized by state officers.

Moreover, where, as in the instant case, evidence is unlawfully obtained in a state whose courts have adopted the exclusionary rule, there are additional reasons for excluding unlawfully obtained evidence in a federal court proceeding. Here, exclusion of the evidence by the federal courts will serve to further the common federal-state pro-

gram, while admission of the evidence will impair the operation of the state exclusionary rule and thereby undermine the common program aimed at securing police observance of basic constitutional rights.

Finally, aside from its deficiencies in terms of constitutional doctrine, the "silver platter" doctrine would be unworkable from a practical standpoint, since the existence of federal-state cooperation, upon which the doctrine's application would depend, is rarely susceptible of proof.

Accordingly, petitioner's conviction, being grounded upon evidence obtained by an unreasonable search and seizure by the state police, should not be permitted to stand.

ARGUMENT

I. The Evidence Upon Which Petitioner Was Convicted Was Obtained in Violation of His Constitutional Rights.

A. The Evidence Upon Which Petitioner Was Convicted, Having Been Obtained by State Police in Violation of State Law, Was Indelibly Tainted and Should Not Be Admitted in a Federal Court.

It is clear that insofar as the legality of the seizure under state law is concerned, the Federal Courts are bound to accept the determination of the state courts.

In this case the state courts have made a final determination that the evidence in question was unlawfully obtained as a matter of state law. It is submitted that the evidence thereby became indelibly tainted and should not be admitted in a federal criminal prosecution. In this regard we believe that the following comment of Mr. Justice Holmes in *Olmstead* v. *United States*, 277 U.S. 438, 470-471 (1928), is particularly apposite:

". . . And if all that I have said so far be accepted it makes no difference that in this case wire tapping is made a crime by the law of the state not by the law of the United States. It is true that a state cannot make rules of evidence for courts of the United States, but the state has authority over the conduct in question, and I hardly think that the United States would appear to greater advantage when paying for an odious crime against state law than when inciting to the disregard of its own. I am aware of the often-repeated statement that in a criminal proceeding the court will not take notice of the manner in which papers offered in evidence have been obtained. But that somewhat rudimentary mode of disposing of the question has been overthrown by Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, L.R.A. 1915B, 834, Ann. Cas. 1915C, 1177, and the cases that have followed it. I have said that we are free to choose between two principles of policy. But if we are to confine ourselves to precedent and logic, the reason for excluding evidence obtained by violating the Constitution seems to me logically to lead to excluding evidence obtained by a crime of the officers of the law."

B. The Search and Seizure of the Evidence in Question Was in Clear Violation of the Constitutional Standards Established by This Court.

It is undisputed that the search and seizure in the present case were conducted without a warrant. Accordingly, the sole question is whether the circumstances were such that a search without warrant was justified. *A review of the authorities demonstrates beyond question that it was not.*

Brinegar v. *United States*, 338 U.S. 160 (1949);
Johnson v. *United States*, 333 U.S. 10 (1948);
United States v. *Di Re*, 332 U.S. 581 (1948);
Carroll v. *United States*, 267 U.S. 132 (1925).

The *Brinegar* and *Carroll* cases establish the periphery of the area of search and seizure. Indeed, since the searches in those cases were based upon express statutory authority, the periphery there established may well transcend the bounds of permissible search in cases, such as the present, where such statutory authority is lacking.

See:

United States v. *Di Re*, *supra*, 332 U.S. 581.

The *Carroll* case, *supra*, involved enforcement of the National Prohibition Laws. The circumstances under which prohibition agents conducted the search and seizure in that case were described as follows by the Court (267 U.S. 161):

> "... They knew or had convincing evidence to make them believe that the Carroll boys, as they called them, were so-called 'bootleggers' in Grand Rapids; i.e., that they were engaged in plying the unlawful trade of selling such liquor in that city. The officers had soon after noted their going from Grand Rapids half way to Detroit, and attempted to follow them to that city to see where they went, but they escaped observation. Two months later these officers suddenly met the same men on their way westward presumably from Detroit. The partners in the original combination to sell liquor in Grand Rapids were together in the same automobile they had been in the night when they tried to furnish the whiskey to the officers, which was thus identified as part of the firm equipment. They were coming from the direction of the great

source of supply for their stock to Grand Rapids, where they plied their trade. . . ."

In upholding the validity of the search and seizure, the Court stated the governing rule as follows (267 U.S. 149):

> "On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. . . ."

In so holding, however, the Court was careful to point out that it was not sanctioning the searching of automobiles upon the mere whim of the officers concerned (267 U.S. 153-154):

> ". . . It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise. . . ."

The *Brinegar* case involved facts substantially similar to those in the *Carroll* case. After noting that "The substance of all the definitions of probable cause is a reasonable ground for belief of guilt" the Court in *Brinegar* went on to observe (338 U.S. 176-177):

> ". . . Since Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where 'the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. . . ."

In upholding the search involved in *Brinegar*, the Court was careful to point out that both the *Brinegar* and *Carroll* cases were of a borderline nature, *i.e.*, that they lay at the periphery of the area of permissible search and seizure (338 U.S. 177-179):

> "The troublesome line posed by the facts in the Carroll case and this case is one between mere suspicion and probable cause. That line necessarily must be drawn by an act of judgment formed in the light of the particular situation and with account taken of all the circumstances. No problem of searching the home or any other place of privacy was presented either in Carroll or here. Both cases involve freedom to use public highways in swiftly moving vehicles for dealing in contraband, and to be unmolested by investigation and search in those movements. In such a case the citizen who has given no good cause for believing he is engaged in that sort of activity is entitled to proceed on his way without interference. But one who recently and repeatedly has given sub-

stantial ground for believing that he is engaging in the forbidden transportation in the area of his usual operations has no such immunity, if the officer who intercepts him in that region knows that fact at the time he makes the interception and the circumstances under which it is made are not such as to indicate the suspect is going about legitimate affairs.

"This does not mean, as seems to be assumed, that every traveler along the public highways may be stopped and searched at the officers' whim, caprice or mere suspicion. The question presented in the Carroll case lay on the border between suspicion and probable cause. But the Court carefully considered that problem and resolved it by concluding that the facts within the officers' knowledge when they intercepted Carroll defendants amounted to more than mere suspicion and constituted probable cause for their action. We cannot say this conclusion was wrong, or was so lacking in reason and consistency with the Fourth Amendment's purposes that it should now be overridden. Nor, as we have said, can we find in the present facts any substantial basis for distinguishing this case from the Carroll case."[12]

"The borderline nature of the *Carroll* and *Brinegar* cases is further evidenced by the decision of the Court in *United States* v. *Di Re, supra.*"

In the *Di Re* case, the Court, in holding that circumstances which might justify the search of a vehicle would

[12] Mr. Justice Jackson dissented in *Brinegar*, declaring (338 U.S. 184):

"... I dissent because I regard it as an extension of the Carroll case, which already has been too much taken by enforcement officers as blanket authority to stop and search cars on suspicion. ..."

not *per se* authorize a search of its occupants, noted that the *Carroll* case and its progeny involved searches made pursuant to the enforcement provisions of the National Prohibition Act, observing that "In view of the strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is 'reasonable,' the Carroll decision falls short of establishing a doctrine that, without such legislation, automobiles nonetheless are subject to search without warrant in enforcement of all federal statutes. This Court has never yet said so. . . . (332 U.S. 586).

In holding the search in *Di Re* unlawful, the Court expressly rejected a contention that the search might be justified by its fruits, observing (332 U.S. 596):

> "The Government's last resort in support of the arrest is to reason from the fruits of the search to the conclusion that the officer's knowledge at the time gave them grounds for it. We have had frequent occasion to point out that a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success."

Finally, the Court emphatically rejected any "appeal to necessity", declaring in language which is equally applicable to the instant case (332 U.S. 596):

> "We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the

lawful authority of those who executed them. The conviction based on evidence so obtained cannot stand."

In *Johnson* v. *United States, supra,* an attempt was made to justify a search and seizure on the basis of observations made by the police in the course of their illicit enterprise. In holding that the officers could not thus lift themselves by their own bootstraps, the Court declared (333 U.S. 18):

> "The Government, in effect, concedes that the arresting officer did not have probable cause to arrest petitioner until he had entered her room and found her to be the sole occupant. It points out specifically, referring to the time just before entry, 'For at that time the agents did not know whether there was one or several persons in the room. It was reasonable to believe that the room might have been an opium smoking den.' And it says, ' * * *-that when the agents were admitted to the room and found only the petitioner present they had a reasonable basis for believing that she had been smoking opium and quite properly stakes the rights to arrest, not on the informer's tip and the smell the officers recognized before entry, but on the knowledge that she was alone in the room, gained only after and wholly by reason of, their entry of her home. It was therefore their observations inside of her quarters, after they had obtained admission under color of their police authority, on which they made the arrest.
>
> "Thus the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do. An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine 'the right of the people to

be secure in their persons, houses, papers and effects, and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."

Applying the principles of the *Carroll*, *Brinegar*, *Di Re* and *Johnson* cases to the instant case, it is clear that the search and seizure with which we are here concerned was unlawful.

Here, the state police testified that at the time of the events in question they had no idea as to petitioner's identity and were not searching for a participant in any known crime. Nor did they have any information with respect to the taxicab in which he was riding or the driver of the cab. Rather, their basis for embarking upon the search in question was (1) the fact that petitioner allegedly looked about before getting into the taxicab, and (2) the fact that he entered the cab in an area (adjacent to the Los Angeles Civic Center) which one of the officers felt had a "bad reputation" for narcotics offenses.

Upon reflection it will be seen that neither of these circumstances was sufficient to create even a mere suspicion of wrongdoing on the part of petitioner, let alone probable cause to believe that he had committed a felony. If the fact that one glances about before entering a taxicab is to furnish the basis for a search by the police, no one could safely use that form of transportation. Likewise, it is hardly consistent with our notions of democracy for a police officer to decide that a particular area of the city is "off limits" to the extent that persons seen in that area will subject themselves to police search. As the state court judge aptly observed in suppressing the very evidence involved in the present case (R. 24):

"I can't possibly see how this arrest could have originally been attempted under the information the officer very frankly tells us that he had. I don't think any reasonable man would think a felony had been committed because a man comes out of a building, looks up the street, and the other way on the street, then looks up First Street, then walks to an automobile in a parking lot, gets in a taxicab and drives away. What in the world there is in that, together with the fact it happens to be First and Hope or First and Flower—I forget which it is—and also that somebody else was arrested in a taxicab, when there are so many hundreds of taxicabs in this community, about three months before, just to state it shows the absurdity of it, insofar as I see, and your motion to suppress the evidence will be granted . . ."

The unlawfulness of the search and seizure in the instant case may be further illustrated by comparing its circumstances with those in *Carroll* and *Brinegar*. In both the *Carroll* and *Brinegar* cases the police did not undertake pursuit until "they recognized both the driver and the car, from recent personal contact and observation, as having been lately engaged in illicit liquor dealings." (338 U.S. 167.) Moreover, in each of those cases the driver was proceeding toward a probable illegal market. Even in the face of such facts the Court regarded the *Carroll* and *Brinegar* cases as "borderline" cases. None of the foregoing factors, which were relied upon as justifying the searches in *Carroll* and *Brinegar*, are present in the instant case, which falls far beyond the pale of permissible search and seizure.

Furthermore, as pointed out in *United States* v. *Di Re*, *supra*, "a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change

character from its success." (332 U.S. 596.)[14] The legal or illicit nature of the enterprise must be determined in light of the facts known to the police at the time they embark upon it. In terms of the present case, the legality of the

---

[14] See also, *United States* v. *Irvin*, 86 F.Supp. 362 (W.D. Ark. 1949), where the court, in holding unlawful a search and seizure based upon a much stronger factual showing than that involved in the instant case, observed (86 F.Supp. 364):

> "It is admitted that the City Police making the search had no search warrant. They had no information from any source that would lead them to believe that the defendant was bringing into the city an automobile load of contraband liquor on that particular day or at that particular time and place. They did have the license number and a general description of the automobile as being one that was sometimes used in the illegal transportation of contraband liquor, that is, illegal under the ordinances of the City of Hot Springs, the law of Arkansas and the law of the United States. In other words, the automobile bearing that particular license number and general description was suspect, but that information did not constitute reasonable grounds to permit the City Police to search the automobile at any and all times wherever it might be found, but in order to constitute probable cause to search without a search warrant, some additional information must have been possessed so that a reasonable person would have had the right to believe that the suspected automobile was engaged in the particular violation at the identical time of the search. The fact that the search disclosed an actual violation cannot be considered, and whenever the testimony of Lt. Rowe and Officer Hughes is considered, the conclusion is irresistible that they acted upon the belief by Lt. Rowe that the license number of the defendant's automobile was one of the suspected license numbers which he had obtained from some source and placed in his book for future reference and use. This was not sufficient, in my opinion, to constitute probable cause and to warrant a search without a search warrant. Therefore, the search was illegal under the Federal, as well as the State, law."

The Court went on to observe (86 F.Supp. 366):

> "The court realizes fully that the effect of the decision in this case may be to release the defendant, who was actually engaged in violating the law, but it is of more importance that our constitutional guarantees be preserved than that any particular individual be punished for a particular offense.
>
> * * *"

search must be determined, not in light of what the police may have eventually uncovered, but rather in light of the facts known to Officers Grace and Beckman at the time they undertook to follow the taxicab in which defendant was riding for some two miles, pull up behind it while it was *en route* to its destination, and approach on opposite sides of the cab for the admitted purpose of attempting to uncover evidence of a narcotics violation. *Up to this point, it is clear that there was not the slightest evidence of any wrongdoing on the part of the defendant, yet the officers had already embarked upon their illegal enterprise.*

Subsequently, Beckman claimed to have seen defendant remove a white object from his jacket pocket. The officer's narrative with respect to this phase of his enterprise appears to have undergone a convenient transition between the time of his original arrest report and the time of his testimony in the federal court on petitioner's motion to suppress.[14] At a time when the events were freshest in his mind, Beckman declared that upon seeing the defendant take the object from his pocket Beckman opened the door of the taxicab, thus proceeding still further in his predetermined purpose to arrest and search the defendant. Even at this point it is clear that the officer was not proceeding upon probable cause. The defendant's alleged conduct in taking an object from his pocket would in itself hardly appear a suspicious circumstance. Indeed, it is almost inconceivable that anyone concealing contraband would, upon being approached by the police, take it from its place of concealment and place it in plain view of the officers.

Lest it be urged that the present requirements with respect to searches and seizures should be relaxed in the

[14] The officer's testimony in the state court appears to represent a midway point in this transition.

interests of greater ease of law enforcement, we wish to call the Court's attention to the following pertinent observation of Mr. Justice Jackson in *Brinegar* (338 U.S. 183):

> "We must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit. We must remember, too, that freedom from unreasonable search differs from some of the other rights of the Constitution in that there is no way the innocent citizen can invoke advance protection. For example, any effective interference with freedom of the press, or free speech, or religion, usually requires a course of suppressions against which the citizen can and often does go to the court and obtain an injunction. Other rights, such as that to an impartial jury or the aid of counsel, are within the supervisory power of the courts themselves. Such a right as just compensation for the taking of private property may be vindicated after the acts in terms of money.
>
> "But an illegal search and seizure usually is a single incident, perpetrated by surprise, conducted in haste, kept purposely beyond the court's supervision and limited only by the judgment and moderation of officers whose own interests and records are often at stake in the search. There is no opportunity for injunction or appeal to disinterested intervention. The citizen's choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence.
>
> "And we must remember that the authority which we concede to conduct searches and seizures without warrant may be exercised by the most unfit and ruthless officers as well as by the fit and responsible, and resorted to in case of petty misdemeanors as well as in the case of the gravest felonies."

C. The Search and Seizure in the Instant Case May Not Be Justified as Incident to a Lawful Arrest.

1. *In Determining the Lawfulness of an Arrest Without Warrant, the Courts Will Look to State Law Insofar as That Law Comports With Federal Constitutional Standards.*

While the lawfulness of a search and seizure under the federal constitution is primarily, of course, a matter for determination by this Court, where it is sought to justify the search as incident to a lawful arrest it is necessary to establish not only that federal constitutional standards have been satisfied, but also that the law of arrest of a particular state has been complied with.

See, *e.g.*:

United States v. *Di Re*, *supra*, 332 U.S. 581;
Johnson v. *United States*, *supra*, 333 U.S. 10.

2. *The Search and Seizure in the Instant Case Were Not Incident to Any Lawful Arrest Under California Law.*

Insofar as the lawfulness of the arrest under state law is concerned, it would appear that the decision of the state courts holding that the arrest was unlawful under California law should be accepted by the federal courts.

See:

Fidelity Union Trust Co. v. *Field*, 311 U.S. 169 (1940);
Erie R. Co. v. *Tompkins*, 304 U.S. 64 (1938).

However, even assuming that the lawfulness of the arrest under California law were a matter for determination by the federal courts independent of the decision of the state court, it is clear that the search and seizure cannot be justified as incident to a lawful arrest.

The basic California statute governing arrest without warrant is Penal Code, Section 836. At the time of the arrest in the instant case, Section 836 provided:[15]

"A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

"1. For a public offense committed or attempted in his presence.

"2. When a person arrested has committed a felony, although not in his presence.

"3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

"4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.

"5. At night when there is reasonable cause to believe that he has committed a felony."

Since the arresting officers conceded that they had no knowledge of any felony having been committed and that no charge had been made against the defendant prior to the events in question, it is clear that grounds three and four of Section 836 are inapplicable.

---

[15] The Section was subsequently amended to read as follows:

"A peace officer may make an arrest in obedience to a warrant, or may, without a warrant arrest a person:

"1. Whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence.

"2. When a person arrested has committed a felony, although not in his presence.

"3. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed."

It is equally clear that at the time the officers embarked upon their unlawful enterprise, defendant was not committing any offense in their presence, so that ground one is likewise inapplicable. (See *People* v. *Brown*, 45 Cal. 2d 640, 290 P.2d 528 (1955).)

In *People* v. *Brown, supra,* the court expressly rejected a contention that where the defendant is in fact guilty of a felony, a search incident to an arrest is authorized under subsection two of Section 836, whether or not the arresting officers have reasonable cause so to believe.

The court, in following a doctrine similar to that voiced by this Court in *United States* v. *Di Re, supra,* emphasized that a search incident to an arrest may not be justified by its fruits, explaining (45 Cal. 2d 644):

> "If, therefore, it is necessary to rely on the search to justify the arrest, the conclusion is inescapable that a search that cannot be justified by what it turns up cannot justify the arrest. Moreover, whether or not the arrest of a guilty defendant is lawful, it is clearly unreasonable if the officer has no 'reasonable cause' to believe the defendant guilty, and a search incident thereto can be no more reasonable than the arrest itself."

It is therefore clear that the search in the instant case may not be justified as incident to an arrest under subsection two of Section 836.

The only possible basis remaining for the arrest in the instant case is subsection five, namely, that there was reasonable cause to believe that defendant had committed a felony. *A review of the California cases demonstrates that the search in the instant case cannot be justified on this ground.*

See, *e.g.*:

People v. *Sanders*, 46 Cal. 2d 247, 294 P.2d 10 (1956);
People v. *Gale*, 46 Cal. 2d 253, 294 P.2d 13 (1956);
People v. *Simon*, 45 Cal. 2d 645, 290 P.2d 531 (1955);
People v. *Kilvington*, 104 Cal. 86, 37 Pac. 799 (1894);
People v. *Goodo*, 147 Cal. App. 2d 7, 304 P.2d 776 (1956);
People v. *Harris*, 146 Cal. App. 2d 142, 304 P.2d 178 (1956).

See also:

Wirin v. *Horrall*, 85 Cal. App. 2d 497, 193 P.2d 470 (1948).

The classic definition of reasonable or probable cause such as would justify an arrest under the law of California is that adopted in the leading case of *People* v. *Kilvington*, *supra*, where the court observes (104 Cal. 92):

> "There is a substantial agreement in the decisions of the courts as to what constitutes probable cause or reasonable cause such as will justify one in arresting or prosecuting another upon a criminal charge; and perhaps as clear and comprehensive a statement of the rule as can be found is that of Shaw, C.J., in Bacon v. Towne, 4 Cush. 217: 'There must be such a state of facts,' said he, 'as would lead a man of ordinary care and prudence to believe, or entertain an honest and strong suspicion, that the person is guilty.' . . . "

In applying the foregoing standard, the California courts have refused to sustain searches incident to arrests premised on factual showings akin to that in the instant case.

Thus, in *People* v. *Simon, supra,* the court states with reference to conduct similar to that which allegedly aroused the suspicions of the police officers in the instant case (45 Cal. 2d 650):

> ". . . the mere fact that two persons walked a few blocks in a warehouse district at night and then retraced their steps would not constitute reasonable cause to believe either had committed a felony, even if the officer had entertained such a belief. . . ."

and again (45 Cal. 2d 650-651):

> "Under these circumstances, to permit an officer to justify a search on the ground that he 'didn't feel' that a person on the street at night had any lawful business there would expose anyone to having his person searched by any suspicious officer no matter how unfounded the suspicions were. Innocent people, going to or from evening jobs or entertainment, or walking for exercise or enjoyment, would suffer along with the occasional criminal who would be turned up. . . ."

In *People* v. *Harris, supra,* the circumstances of the arrest were described by the court as follows (146 Cal. App. 2d 143):

> "Leon Harris was arrested by Officer Giannini at approximately 2:15 or 2:20 a.m., April 17, 1955. Officers Giannini and Hess were on foot patrol duty when they observed appellant in the doorway of a liquor store at the corner of Fillmore and McAllister Streets. He was talking with another person, and every few moments would leave the doorway, look down the street and return to the doorway. The officers testified that he was acting very suspiciously."

After noting that "A search cannot be justified by what it produces" (146 Cal. App. 2d 147) the court concluded (146 Cal. App. 2d 147):

> ". . . We are of the view that the evidence is insufficient to show that the search was reasonable and that the judgment must be reversed on this ground."[16]

In *People* v. *Gale, supra,* defendant was arrested after stopping at a sheriff's check station at the Mexican border. The circumstances of the arrest and the search incident thereto were described by the court as follows (46 Cal. 2d 255):

> ". . . One of the officers noticed that the front of the car appeared to have been in a recent accident and asked defendant to drive to the side of the road and stop in front of the sheriff's substation office. Defendant got out and told one of the officers that the car had been damaged in an accident about a month before in Los Angeles. This officer asked defendant and his friend to come into the office and told another officer to give the car a complete 'shakedown.' With the aid of his flashlight, the inspecting officer found under the right hand side of the front seat a spoon, a capsule of white substance, a needle, a medicine dropper, and a small scabbard. The white substance was later identified as a narcotic. . . .
>
> * * * * *"

In holding that there was no reasonable cause for the arrest and search, the court declared that the mere possibility that such cars were being used to further criminal ventures could not justify the stopping and searching of

---

[16] See also, *People* v. *Goodo*, 147 Cal. App. 2d [illegible], 10, 304 P.2d 776 (1957).

automobiles lawfully using the highways "in the hope that some criminals will be found." [17] (46 Cal. 2d 256.)

In *People* v. *Sanders, supra,* the officers went to defendant's place of business, and after entering the front room of the shop, which was open to the public, looked through a door leading to a second room, and on the basis of that observation entered the second room, which was not open to the public, and arrested defendant for bookmaking. In holding the search unlawful, the court observed (46 Cal. 2d 249-250):

> "The attorney general contends that when the officers looked through the door into the second room, they had reasonable cause to believe that defendant had committed a felony and that he was committing the offense of occupying premises for the purposes of bookmaking in their presence, and that therefore the arrest and search were lawful. . . .
>
> "When the officers looked through the door they saw nothing that was incriminating. They merely saw defendant standing behind a desk with a pencil in his hand and two pads of paper in front of him. There was writing on the pads. Defendant was operating a record store open to the public, and just as in the case of any shopkeeper, businessman, or professional man, he

---

[17] In *Wirin* v. *Horrall, supra,* the court, in holding the indiscriminate use of police roadblocks unlawful, declared (85 Cal. App. 2d 501):

> "Persons lawfully within the United States of America are entitled to use the public highways and have a right to free passage thereon without interruption or search, unless a public officer authorized to search knows of probable cause for believing that the vehicle is carrying contraband or that the occupants thereof have violated some law. . . ."

See, also *Badillo* v. *Superior Court,* 46 Cal. 2d 269, 294 P.2d 23 (1956); *Gascon* v. *Superior Court,* 169 A.C.A. 367, 337 P.2d 201 (1959).

might reasonably be expected to have pencils and pads of paper available for making notes and memoranda for use in the legitimate conduct of his business. Moreover, the fact that the pads of paper were of the kind used by bookmakers in the area is of no significance. They were ordinary small pads of paper of the sort that may be purchased in any stationery store and that are undoubtedly used by all sorts of persons for all sorts of purposes. Similar pads may be found in almost every office, and certainly, the fact that bookmakers also use them cannot constitute reasonable cause to believe that everyone using them is engaged in bookmaking."

The court concluded that (46 Cal. 2d 250):

"... before the arrest and search defendant's activities appeared to be perfectly consistent with the lawful conduct of his record business. ..."

The court specifically rejected a contention by the State that "the officers could reasonably conclude that defendant's apparently innocent activities were bookmaking on the ground that another person had been arrested for bookmaking at the record shop the day before." (46 Cal. 2d 251) —a far more plausible contention than the "suspicious neighborhood" theory upon which the Government relies in the instant case.

Applying the foregoing authorities to the facts of the instant case as heretofore summarized, it is clear that the search in the instant case may not be justified as incident to a lawful arrest made on probable cause.

It should be noted that we are not here concerned with a mere routine interrogation of a pedestrian of occupant of

a parked automobile under circumstances which have aroused the suspicion of a police officer.

cf., *People* v. *Martin*, 46 Cal. 2d 106, 293 P.2d 52 (1956) (male occupants of a car parked in lovers lane fled approaching patrol car);

People v. *Blodgett*, 46 Cal. 2d 114, 293 P.2d 57 (1956) (questioning at 3 a.m., of occupants of parked cab not unusual "in view of the hour and the unusual conduct of the occupants");

People v. *Rodriguez*, 140 Cal. App. 2d 865, 296 P.2d 38 (1956) (questioning by a patrolling officer of one who appeared to be under the influence of narcotics).

In the instant case, not only was there a lack of suspicious circumstances to justify the course of conduct adopted by the police with respect to petitioner, but that conduct itself was of a far different nature than that involved in the "routine interrogation" cases. Here the police followed and overtook a vehicle proceeding along the center lane of a public highway, albeit at the particular instant where the police chose to "make their move" the cab may have been stopped for an instant at a traffic signal. Accordingly, such cases as *People* v. *Martin*, *People* v. *Blodgett* and *People* v. *Rodriguez*, *supra*, can have no application here.

The foregoing distinction is pointed up in *People* v. *Harvey*, 142 Cal. App. 2d 728, 730-732, 299 P.2d 310 (1956):

> "About 8:30 p.m. the police officers arrived at the stake-out. They concealed themselves across the street from appellant's residence behind a tree. A few minutes later appellant arrived on the scene in a 1950 Cadillac. Appellant got out of the Cadillac and apparently stood by it a little while. A blue coupe approached and parked just behind appellant's car. Appellant walked

up to the occupant of the coupe, who remained in his car, and talked with him several minutes. The coupe then drove away. Appellant walked across the street toward his residence. He looked at something that was on the windshield of another car and then disappeared from the officers' view.

"A few minutes later the officers saw appellant coming down an outside flight of stairs from his upstairs apartment. Appellant stood for a few seconds at the foot of his stairs looking up and down the street with his hands in his overcoat pockets. He crossed the street to where the officers were standing behind the tree. Appellant looked up and down the street. The officers then decided to take him into custody.

"Officer Russo testified: 'We thought something was wrong.'

"The officers testified that they identified themselves as officers, showed their police badges and asked appellant to take his hands out of his pockets. Appellant did not comply but backed off from the officers. A struggle ensued. Three other officers arrived and appellant was subdued. All of the police officers were in civilian clothes. Officer Russo took a package from appellant's hand which was later found to contain marijuana.

* * * * * *

"We agree with appellant's contention that the marijuana was obtained by an illegal search and seizure.

"When the officers stepped from behind the tree and approached the defendant with the avowed purpose of placing him under arrest they had no legal ground for arresting him. His conduct up to that time was such as any man may legally engage in on a public street without arousing suspicion of misconduct. He had parked his car, talked to a person in another car, looked at

something on the windshield of a third car, gone into his house, left his house again with his hands in his pockets, crossed the street and stood on the sidewalk looking up and down. These were all innocent actions that any law-abiding citizen should be able to engage in without fear of search or arrest. The fact that defendant was believed to be dealing in narcotics, added to such innocent conduct as the officers observed, was not sufficient to justify defendant's arrest without a warrant. . . .

"The People however argue that since the officers had the right to interrogate a man found upon the street at night, People v. Blodgett, 46 Cal. 2d 114 (293 P.2d 57), the conduct of the defendant in backing away and refusing to take his hands from his pockets constituted suspicious conduct which justified the officers in seizing and searching the defendant. People v. Blodgett, supra; People v. Martin, 46 Cal. 2d 106 (293 P.2d 52).

"The difficulty with this argument is that the police officers were not interrogating the defendant, but by their own unqualified testimony they were arresting him. Aiello testified that just before they stepped out from behind the tree: 'I says, "Shall we place him under arrest" and he says "Okay," so I walked out first.' Russo testified 'we nudged each other and says, "let's place him into custody."'

"From the testimony of the officers it is clear that they approached the defendant, identified themselves to him as officers and requested him to remove his hands from his pockets as a step in his arrest, which they had already determined upon. They had no intention of interrogating him. They had already decided to arrest him and were carrying out that decision. Since the arrest was illegal their illegal conduct cannot become legal by what was disclosed while they were engaged in making the illegal arrest. . . ."

II. The Mere Fact That the Unlawful Search and Seizure in the Present Case Was Conducted by State Officers Does Not Preclude Application of the Exclusionary Rule.

Preliminary Statement: Since, as we shall demonstrate hereafter, adoption of the "silver platter" doctrine by this Court would serve to undermine the effectiveness of the exclusionary rule, we believe it is in order to emphasize the importance of the exclusionary rule and the consequent need to reject a proposed principle of law which would serve to vitiate its effectiveness. Toward this end we have set forth as Appendix A to this brief a series of extracts from opinions and writings in the field which point up the importance of the exclusionary rule as the only effective safeguard of the basic constitutional rights secured by the Fourth Amendment and its counterparts in the constitutions of the various states.

Moreover, since we are particularly concerned in the instant case with a course of action tending to undermine the effectiveness of the California exclusionary rule, we believe it is likewise appropriate to relate the background of that State's exclusionary rule and the benefits which have derived from its adoption. The latter materials are set forth in Appendix B to this brief.

A. The "Silver Platter" Doctrine Has Not Been Adopted by This Court.

While the doctrine that evidence obtained by state officers without federal participation or cooperation may be admitted in a federal prosecution, *i.e.*, the so-called "silver platter" doctrine, has been mentioned in some of the decisions of this Court (see e.g., *Weeks* v. *United States*, 232 U.S. 383, 34 S.Ct. 341, 345, 346 (1914) and *Byars* v. *United States*, 273 U.S. 28, 47 S.Ct. 248, 249, 250 (1950)) the ques-

tion whether the doctrine is to be adopted or rejected by this Court is still an open one.[18]

Thus, in *Lustig* v. *United States*, 338 U.S. 74, 69 S.Ct. 1372 (1949), the Court expressly declined to pass upon the question.[19]

Again in *Benanti* v. *United States*, 355 U.S. 96, 78 S.Ct. 155 (1957), this Court observed (355 U.S. 158, footnote 10):

> "It has remained an open question in this Court whether evidence obtained solely by state agents in an illegal search may be admissible in federal court despite the Fourth Amendment. See Lustig v. United States, 338 U.S. 74, 78-79, 69 S.Ct. 1372, 1373-1374, 94 L.Ed. 1819. . . ."

B. The "Silver Platter" Doctrine Has Been Rejected by the Better Reasoned Cases in the State Courts.

The state courts in those states which have adopted the exclusionary rule have been faced on occasion with a prob-

---

[18] The lower federal courts are divided on the question. Compare *Rios* v. *United States*, 256 F.2d 173 (C.A. 9, 1958); *Costello* v. *United States*, 255 F.2d 389 (C.A. 8, 1958) and *Serio* v. *United States*, 203 F.2d 576 (C.A. 5, 1953) with *Hanna* v. *United States*, 260 F.2d 723 (D.C. 1958), discussed *infra*, pages 48-52.

[19] In commenting upon the *Lustig* case, one writer has observed (50 A.L.R. 2d 373):

> "In the most recent case decided by the United States Supreme Court and dealing with the question discussed at this point, Lustig v. United States (1949), 338 U.S. 74, 93 L.ed. 1819, 69 S.Ct. 1372, the majority of the court left open the question whether an illegal search by state officers without federal participation bars the introduction of the fruits of the search in a federal court (the holding being based on a finding of federal participation). However, some of the justices (Murphy, Douglas, and Rutledge, JJ., and apparently also Black, J.) expressed the view that evidence should be suppressed in a federal court even if the search had been made solely by state officers and the state officers were not acting to enforce federal law."

lem analogous to that with which we are here concerned, namely, whether evidence unlawfully seized by *federal officers* should be excluded in a criminal prosecution in the *state courts*. While there is language in a few cases suggesting that such evidence should not be excluded, the better-reasoned authorities, which appear to reflect the weight and trend of authority, have held that such evidence will be excluded.

See, *e.g.*:

State v. *Arregui*, 44 Ida. 43, 254 Pac. 788, 52 A.L.R. 463 (1927);
Walters v. *Commonwealth*, 199 Ky. 182, 250 S.W. 839 (1923);
Little v. *State*, 171 Miss. 818, 159 So. 103 (1924);
State v. *Rebasti*, 306 Mo. 336, 267 S.W. 858 (1924);
Judson A. Parsons, Jr., *State-Federal Crossfire in Search and Seizure and Self Incrimination*; 42 Corn. L.Q. 346, 348 (1957).

And see:

Ramirez v. *State*, 123 Tex. Crim. 254, 58 S.W.2d 829 (1933);
State v. *Hiteshew*, 42 Wyo. 147, 292 Pac. 2 (1930).

Contra:

State ex rel. Kuhr v. *District Court*, 82 Mont. 515, 268 Pac. 501 (1928).

In *State* v. *Hiteshew*, *supra*, the court comments as follows on the state of the law in this area (292 Pac. 4):

". . . In Kentucky, Missouri and Idaho it is held that, when evidence is obtained by federal officers by a seizure unlawful under the laws of the United States, it must be suppressed in a prosecution in the state

courts. State v. Arregui, 44 Ida. 43, 254 Pac. 788, 52 A.L.R. 463; State v. Rebasti, 306 Mo. 336, 267 S.W. 858, 861; Walters v. Commonwealth, 199 Ky. 182, 250 S.W. 839; Caudill v. Commonwealth, 202 Ky. 730, 261 S.W. 253; State v. Horton, 312 Mo. 202, 278 S.W. 661. In the Idaho and Missouri cases it happened that the warrants were invalid under both state and federal laws, but we think that we have correctly construed the holding of these courts. The rule laid down in these cases is, that it is as much the duty of the state courts as it is of the federal courts, to uphold the provisions of the 4th amendment to the constitution of the United States regarding unreasonable searches, and that if the evidence of the federal officers is obtained unlawfully, and cannot for that reason be received in the federal courts, it cannot be transformed into lawful evidence by being offered in the state courts. . . ."

While the rulings in these cases are admittedly not controlling here as precedent, the reasoning of the courts which have excluded such evidence is deserving of more than passing notice.

Thus, in *State* v. *Rebasti, supra,* the court states (306 Mo. 347, 348, 349):

"It is unthinkable that a State court is powerless to protect the constitutional rights of its citizens, guaranteed by the Federal Constitution. To hold the evidence of the Federal agents admissible in this case is to pronounce that doctrine. It is to say that the act of an officer, or of any other individual, is lawful or unlawful, not on account of the character of the act, but on account of the court in which it is called in question.

* * * * *

"Suppose a Federal officer should make an unreasonable search, and in doing so outrage the citizen's rights under the United States Constitution. Can it be said that the unlawful act of the officer could become lawful because of the court in which it is questioned? Suppose the injured citizen should sue him in the State court for damage done in violation of his constitutional rights, and the officer in defense should plead that, although he acted unlawfully, the plaintiff had no right to prove it in a State court. Does anyone suppose the plea would be good?

"In this case the Federal officer violated the constitutional rights of the defendant, and violated the constitutional restrictions upon his own behavior as a Federal officer. Had the case been pending in the Federal court he could not have testified, because his act in procuring his information was unlawful. His case, however, is pending in the State court and it is contended that he may testify because his act was *lawful*. By that theory his act becomes lawful or unlawful, not because of its quality, but because of the court which decides the question. He can bring his misdemeanor to a State court and there have his lawless disregard of his official duty appraised as a meritorious performance.

* * * * *

"The only safe and sound construction of the situation is to say that when a Federal officer violates the constitutional restriction upon his conduct so as to make evidence procured in such violation incompetent, that it is incompetent everywhere offered." (Emphasis the court's.)

Again in *Walters* v. *Commonwealth*, *supra*, the court observes (199 Ky. 186, 187):

"But as the same act of a citizen of both a state and the United States renders him amenable to both sovereignties under which he must live, if each but protects him under similar guaranties of their respective constitutions against unlawful activities of its own officers, it would result that the state officials might search a citizen without a warrant and the evidence thus unlawfully obtained be used against him in the federal courts, and he likewise would be without protection in the state courts against unreasonable searches by federal officers other than by an action for damages, which both the courts of this Commonwealth and of the United States have held inadequate.

"Surely the same guaranties by the dual sovereignty mean more than that, and they should be so construed as more effectively to protect the citizen's immunities from governmental interference, which each within its sphere has declared sacred.

* * * * *

"We therefore conclude that the evidence introduced against defendant was competent, provided the federal search warrant under which it was obtained was valid, but not otherwise."

In *Little* v. *State, supra*, the court states (171 Miss. 823):

". . . Many acts in common are denounced as crimes both by the Congress and the Legislatures of the states. If the fruits of an illegal search under federal authority can be used in the state courts, and vice versa, the constitutional guaranty would be to a large extent nullified."

Again, in *State* v. *Arregui, supra*, the court comments as follows (254 Pac. 796):

"It would be anomalous for a state court to say: 'The state demanded that the federal government and federal authority be thus restricted against the violation of the rights of a citizen of this state; yet if they do violate the Constitution and violate the rights of our citizens, we will not enforce the observance of those provisions, but will effectuate the evil by recognition and judicial sanction of the fruits of such violation. And although there are the same restrictions in the state Constitution, we will judicially sanction the violation of your rights under the federal Constitution, although to do so we must become a party to the violation of both Constitutions.'

"In the hands of the state courts is placed the power to prevent, in part, the violation of the rights of a citizen by federal authorities in violation of state and federal Constitutions. This is not only in the power of the state court, but its duty. If, as said in the Burdeau Case, the 4th Amendment to the federal Constitution 'was intended as a restraint upon the activities of sovereign authority, . . . governmental agencies,' and in the Byars Case, 'the assurance against any revival of' the 'misuse of power in the matter of searches and seizures,' embodied in the 4th Amendment, 'is not to be impaired by judicial sanction of equivocal methods, . . . which, in reality, strike at the substance of the constitutional right,' and as the same intention prompted the adoption of the provisions of our state Constitution 'to secure the people against unauthorized official action,' there seems no other logical conclusion than that unauthorized official action should not receive judicial sanction by receipt of evidence in a state court, although secured by federal officers, which, upon the same showing of facts would be denied in a federal court, when to do so would

be to violate the same right guaranteed by both the federal and state Constitutions."

It is submitted that the reasoning of the courts in the foregoing cases is equally cogent in the converse situation, as presented in the instant case, and that here, too, the Court should not permit our dual system to serve as a vehicle for frustrating the common policy of both State and Nation.

C. Adoption of the "Silver Platter" Doctrine Would Be Irreconcilable With the Holding of This Court in *Wolf* v. *Colorado*.

This Court, while refusing to compel states to adopt the federal exclusionary rule which now prevails in California, has recognized that an unlawful search and seizure in itself constitutes a denial of Due Process.

Wolf v. *Colorado*, 338 U.S. 25, 27-28 (1949).

Thus, Mr. Justice Frankfurter, speaking for the Court in *Wolf* v. *Colorado*, *supra*, stated (338 U.S. 27-28):

> "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.

"Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. . . ."

In light of the foregoing holding, it seems inconceivable that evidence unlawfully obtained by state officers through an unlawful search and seizure which, under *Wolf*, would constitute a violation of petitioner's rights under the Federal Constitution, could nevertheless be admitted in a federal criminal proceeding. That the constitutional infringement is equally grave whether the unlawful search be conducted by state or federal officers can no longer be doubted. That the exclusionary rule affords the only effective safeguard yet devised to curtail such infringements is likewise free from doubt. (See Appendix A.) Accordingly, the same considerations which led this Court to exclude evidence unlawfully seized by federal officers likewise compel the exclusion of evidence unlawfully seized by state officers.[20]

---

[20] Various writers in the field have noted that the decision of this Court in the *Wolf* case is irreconcilable with the "silver platter" doctrine.

See, *e.g.*, 50 *A.L.R.* 2d 531, 573-574; *Admissibility in Federal Courts of Evidence Obtained Illegally by State Authorities*, 51 Col. L. Rev. 128 (1951).

As one writer has observed (51 Col. L. Rev. 130):

> "Recently, however, the Supreme Court stated that the Fourteenth Amendment protects against unreasonable searches and seizures by state officials, although due process does not require a state court to exclude evidence so procured. Reluctance to interfere with state court procedure appears to afford a reasonable basis for applying this rule with respect to the admission of evidence in state courts. In the federal courts, however, suppression of evidence unreasonably obtained by either federal or state officers would not seem justified, since it would provide a degree of deterrence which would not interfere with any delicate federal-state relationship."

See:

Hanna v. *United States, supra,* 260 F.2d 723.

In the *Hanna* case the court held that evidence obtained by an unreasonable search and seizure by state officers without any participation or cooperation by federal authorities is inadmissible in a federal court—precisely the position for which petitioner is here contending. In so holding, the court, in an opinion by Judge Hastie, reviewed the history of the "silver platter" doctrine and concluded that that doctrine was irreconcilable with the holding of this Court in *Wolf*. The courts which continued to apply the "silver platter" doctrine after the *Wolf* decision had failed to give due consideration to the *Wolf* case, Judge Hastie declared. After noting that several members of this Court had recognized that unreasonable searches and seizures by state and federal officers should be accorded similar treatment in the federal courts,[21] Judge Hastie concluded (260 F.2d 728-729):

---

[21] In this regard Judge Hastie observed (260 F.2d 726-727):

"Even more striking are expressions of opinion by three other Justices. Mr. Justice Douglas, dissenting from the ultimate holding in Wolf v. People of State of Colorado, supra, tersely stated his conclusion that state and federal courts should be required to exclude evidence obtained by either state or federal officers through an unreasonable search. 338 U.S. at page 40, 69 S.Ct. at page 1367. On a subsequent occasion he reaffirmed his conviction that 'we should be alert to see that no *unconstitutional* evidence is used to convict any person in America.' See Irvine v. People of State of California, 1954, 347 U.S. 128, 149, 152, 74 S.Ct. 381, 394, 98 L.Ed. 561.

"Mr. Justice Clark has gone just as far. Only stare decisis has persuaded him to support the ultimate Wolf conclusion that a state court may use unconstitutionally obtained evidence. See Clark, J., concurring in Irvine v. People of State of California, supra, 347 U.S. at page 138, 74 S.Ct. at page 386. In the federal courts he would apply the basic generalization of the Weeks case, 'that evidence obtained in violation of rights protected by the Fourth Amendment to the Federal Constitution must be excluded in federal criminal prosecutions.' See Breithaupt v. Abram, 1957, 352 U.S. 432, 434, 77 S.Ct.

"On principle and as a matter of sound policy in the administration of judicial proceedings in the District of Columbia we think all evidence obtained by

---

408, 409, 1 L.Ed. 2d 448. And in the light of his dissatisfaction with the ultimate Wolf holding it is impossible to believe that he would restrict this considered generalization to cases where the violation of the Constitution has been by federal officers.

"Finally, Mr. Justice Harlan has put his view of the impact of Wolf on Weeks quite succinctly:

"'* * * the only difference I can see between the Wolf decision and Weeks v. United States, * * * excluding in federal criminal trials evidence obtained in contravention of the Fourth Amendment, is the difference between state and federal courts; in each case, the substance of the constitutional command is the same, but the nature of enforcement varies with the forum.' See dissenting opinion in Rea v. United States, 1956, 350 U.S. 214, 218, 220, 76 S.Ct. 292, 296, 100 L.Ed. 233.

"The 'constitutional command', if we understand Justice Harlan correctly, enjoins federal and state officers alike from unreasonable searches and seizures. Thus, the Justice seems to be saying that the Weeks case requires one type of enforcement of this comprehensive command in federal courts, while the Wolf case permits less drastic enforcement in state courts.

"On the other hand, one Justice seems to have committed himself since and despite the Wolf case to a continuing recognition in federal trials of the original Weeks distinction between federal and state seizures. We think this is the necessary meaning of Mr. Justice Burton's concurrence in the dissent in Lustig v. United States, supra, 338 U.S. at page 80, 69 S.Ct. at page 1374, although we are not unmindful that he joined later in Mr. Justice Harlan's dissent in the Rea case, discussed above. In any event, no other Justice now in active commission seems to have approved the Weeks distinction since the Wolf decision.

"In cumulative effect these several pronouncements by so many Justices of the present Court support the rational argument that the Weeks and the Wolf decisions, considered together, make all evidence obtained by unconstitutional search and seizure unacceptable in federal courts. At very least it seems clear that this is a position toward which several Justices are strongly inclined, with one Justice apparently in disagreement and others indicating no more than that they regard the question as open. Certainly, neither the Weeks holding as to state-seized evidence nor our own Shelton decision can properly be regarded as binding precedents in the light of the subsequent Wolf ruling and the cited indications of the present views of so many justices."

violation of the Constitution should be excluded. In this area, as Mr. Justice Jackson has reminded us, decision 'whether to exclude illegally obtained evidence in federal trials is left largely to our discretion, for admissibility of evidence is governed "by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. Rules Crim. Proc., 26.' See Irvine v. People of State of California, 1954, 347 U.S. 128, 134-135, 74 S.Ct. 381, 384, 98 L.Ed. 561. What then should be the controlling considerations when unconstitutionally obtained evidence is offered in a court of the United States? One influential consideration is that which moved Justice Holmes and Justice Brandeis in their celebrated Olmstead dissents. Mr. Justice Holmes put it this way:

"* * * * government ought not to use evidence obtained and only obtainable by a criminal act. * * * I think it a less evil that some criminals should escape than that the government should play an ignoble part." Olmstead v. United States, 1928, 277 U.S. 438, 469, 470, 48 S.Ct. 564, 575, 72 L.Ed. 944.

"This concern with the integrity of the judicial process must be most serious when the evidence has been obtained by a violation of the Constitution itself. The effectiveness of courts must always depend in large measure upon the respect which their processes command by reason of the integrity they reveal. From that point of view the courts of the United States, the ultimate guardians of the Constitution, cannot afford to play the 'ignoble part' by themselves permitting the use of unconstitutionally obtained evidence, solacing and absolving themselves by deploring the unconstitutional seizure and pointing out that in some other proceeding sanctions can or should be imposed

against the violation of our fundamental law. This very point was made in the Weeks case with reference to evidence which federal officers had obtained by unreasonable search:

"'The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures * * * should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.' 232 U.S. at page 392, 34 S.Ct. at page 344.

"But the Wolf case has made this reasoning equally applicable to the now equally unconstitutional seizures by state officers.

"Beyond the issue of judicial integrity, we should not assume that the refusal of the federal courts to permit the use of improperly obtained evidence will have no effect in persuading state as well as federal officers to follow constitutional methods and procedures in obtaining evidence. In the Weeks case the Supreme Court went so far as to say that if articles can be seized illegally by federal officers and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.' It cannot rationally be argued that the constitutional protection is so gravely impaired by using such evidence in federal courts when a federal officer has violated the Fourth Amendment, but that there is no significant impairment when it is a state officer who has been guilty of an equivalent violation of the Fourteenth Amendment. Perhaps the sanction

of excluding such evidence from federal trials has a greater deterrent effect upon federal officers than upon state officers. But there is no calculus to measure such a difference, nor is it the kind of difference which warrants opposite conclusions as to the admissibility of the evidence."

D. Application of the "Silver Platter" Doctrine to Evidence Unlawfully Seized by State Officers in an "Exclusionary Rule" State Would Undermine the Effectiveness of That State's Exclusionary Rule. Contrary to the Common Federal-State Policy.

Even where the state courts admit evidence obtained by unlawful search and seizure, there are compelling reasons why such evidence should nevertheless be excluded by federal courts. But where evidence is so obtained in a state, such as California, where the courts exclude evidence unlawfully obtained, the case for excluding such evidence is even stronger. In such a situation the exclusion of the evidence by the federal courts serves to further the common federal-state program, while admission of such evidence impairs the operation of the state exclusionary rule and thereby undermines the common program aimed at securing police observance of basic constitutional rights.

Accordingly, regardless of the rule adopted in other circumstances, it is clear that the federal courts should exclude evidence unlawfully obtained by state officers in a state which follows the exclusionary rule.[22]

---

[22] The opinion of the Court of Appeals states that the "silver platter" doctrine is applicable "even though the state wherein the evidence was seized, as in the case of California, has a state exclusionary rule similar to the federal court exclusionary rule announced in Weeks, supra." In support of that statement, the Court cites three cases, namely, *United States* v. *Stirsman*, 212 F.2d 900 (C.A. 7, 1954), *Jones* v. *United States*, 217 F.2d 381 (C.A. 8, 1954), and *Parker* v. *United States*, 183 F.2d 268 (C.A. 9, 1950). However,

As one writer has observed:

> "Surely in states whose courts would not admit such evidence, the federal courts should not do so either. In those states, it has been determined by proper authority that the rule of evidence is a necessary measure for protecting state citizens against unlawful state action. Federal courts ought to recognize this policy. The Supreme Court must carefully scrutinize state criminal procedure to keep it up to minimal due process standards. Should it not also see that federal courts help rather than hinder state efforts to bring law enforcement up to even higher standards?
>
> ". . . Excluding evidence illegally obtained by state officers may prevent full discovery of the truth. But if restraining federal officers from unconstitutional activity is important enough to cause federal courts to keep out some relevant evidence, surely state efforts to control state officers are important enough in the federal scheme of things to merit similar treatment."
>
> Judson A. Parsons, Jr., *State-Federal Crossfire in Search and Seizure and Self Incrimination*, 43 Corn. L.Q. 346, 363 (1957).

The foregoing observations find support in the decision of this Court in *Rea* v. *United States*, 350 U.S. 214 (1956). In the *Rea* case, the Court held that a federal court might properly enjoin federal officers from testifying in a state court action regarding the results of an illegal search and seizure, so that the state forum might not be used to

---

a reading of the *Stirsman*, *Jones* and *Parker* cases, *supra*, reveals that assuming that the states in question did have the exclusionary rule at the time of those decisions, the effect of *the state exclusionary rule was neither raised nor considered* in any of those cases. Moreover, neither *Stirsman*, *Jones* nor *Parker* involved a prior state court determination that the evidence in question was unlawfully seized and therefore inadmissible in a state court prosecution.

circumvent the exclusionary rule followed in the federal courts.

Clearly, if the federal courts are to prevent use of state forums to circumvent the federal prohibition against use of evidence obtained by illegal searches and seizures, the federal courts should not sanction use of their own forums to circumvent a similar state prohibition.

Such a result is dictated not only by considerations of comity and a respect for our state judicial systems, but also by the need to further the common policy adopted by both the California Supreme Court and this Court, *each of which has found the exclusion of unlawfully seized evidence the only effective safeguard against unconstitutional searches and seizures.*

Here, the search and seizure was made by state officers. Just as the federal courts are charged with primary responsibility for regulating the conduct of federal officers, as forcefully demonstrated in the *Rea* case, so must the California courts be accorded a like opportunity with respect to California police officers. If the California courts find, as they have found in the instant case, that in order to prevent unlawful searches and seizures they must exclude the evidence at issue here, the federal courts should assist, rather than frustrate, that undertaking.[23]

Yet, in the instant case state police officers, after failing to obtain a conviction in the state courts because of the tainted nature of their evidence, have been permitted to

[23] The recent decision of this Court in *Benanti* v. *United States*, 355 U.S. 96, 78 S.Ct. 155 (1957), holding that evidence obtained by state officers in violation of the Anti-Wire Tapping Act is inadmissible in a federal court action, likewise reflects recognition of the underlying theory which petitioner is urging here, namely, that our dual system should not be used to circumvent an exclusionary rule rooted in deep-seated policy considerations.

obtain a conviction in a federal court by enlisting the aid of federal authorities. The dangers inherent in such a practice are readily apparent. A state police officer need no longer be concerned with an adverse final decision of a state court excluding evidence as obtained in violation of the constitutional rights of the accused. *All the state officer need do, as was done in the instant case, is to "cross the street" to the Federal courthouse.*

E. The "Silver Platter" Doctrine Would Be Unworkable.

Aside from its deficiencies in terms of constitutional doctrine, the "silver platter" doctrine would be unworkable from a practical standpoint. Since the touchstone of the doctrine is federal-state cooperation, application of the doctrine presupposes the feasibility of establishing whether such cooperation is present in a given case. In practice, however, though such cooperation is undoubtedly quite prevalent, it is rarely susceptible to proof. Certainly the cooperating authorities themselves can hardly be expected to come forward to aid the defendant. Yet without their aid the task of the defendant is usually a hopeless one, particularly when we consider that federal-state cooperation in this area is reflected in tacit understandings rather than formal compacts. In light of these difficulties of proof, it is submitted that the "silver platter" doctrine is unworkable from a practical standpoint, as well as theoretically unsound.[24]

---

[24] It should be noted that petitioner was prevented from fully exploring on cross-examination the question whether the conduct of state officers in the instant case was pursuant to a general pattern of ecoperation (R. 60), although it is only logical to assume that the willingness of the federal authorities to prosecute the defendant at the instance of the arresting state officers reflects a broader pattern of cooperation.

CONCLUSION

The evidence upon which petitioner was convicted was obtained by an unreasonable search and seizure conducted in violation of petitioner's constitutional rights. Considerations of policy and precedent dictate that a conviction so obtained should not be permitted to stand. Accordingly, we respectfully request that the decision below be reversed.

Respectfully submitted,

CLORE WARNE
6535 Wilshire Boulevard
Los Angeles 48, California
Counsel for Petitioner

Of Counsel:
HARVEY M. GROSSMAN

APPENDIX A

Value and Importance of the Exclusionary Rule

Judicial Control of Illegal Search and Seizure, 58 Yale L.J. 144 (1948).

"Particularly when they are dealing with known criminals, or the 'criminal classes,' police and prosecutors tend to regard lawless methods as justifiable. For the average policeman the community tends to become divided into good men and bad men; the 'good' men are the more respectable elements, and the 'bad' men are not only the known criminals but the 'suspicious characters,' the vagrants, and the members of unpopular minority groups. For these groups, constitutional privileges are deemed waived in varying degrees, depending on the disfavor with which the policeman views the suspect. The prosecutor, whose record of convictions is his political opportunity, may be tempted to adopt the same attitude, albeit sometimes in a more sophisticated form.

"Police lawlessness excused as expediency has been encouraged by apathy and occasional affirmative support both from the public and its elected leaders. Defendants are to a large extent protected, for statutes generally provide that civil servants' salaries cannot be garnished in the event of civil suit, and policemen are frequently indemnified from loss and defended without cost. But the wronged plaintiff, who is likely to be both ignorant and poor, receives little or no help from the public, and must usually proceed alone for whatever damages he can collect. Chief executives of municipalities, states, and the nation itself have aided in the handicapping process by their reluctance to demand prosecution of offending officers, and in some cases are themselves responsible for policies of wholesale illegality.

"In the unique area of lawless enforcement of the law, the neglect, if not the adverse interest, of the normal prosecuting agencies and the public leaves the courts alone to intervene. Since the normal law enforcement agencies are

themselves the law-breakers, control of this kind of crime is peculiarly difficult and also doubly important."

58 Yale L.J. 145-147

"Of the possible explanations for the rule, the simplest and best seems to be that the searches and seizures clauses require it, if the granted immunity is to be in fact enjoyed. The necessity which mothered the rule was the widespread practice of illegal search, untrammeled as it was by existing legal or social restraints. Then and in recent years civil suits for damages have seldom been undertaken even by innocent search victims, for the same reasons which militate against the recovery of persons injured by any other police illegality. Despite the ineffectiveness of civil suit, governments have generally failed to provide an effective statutory remedy for the search victim, and have uniformly failed to prosecute the wrongdoers. Thus the exclusionary rule's specific purpose is to furnish a needed deterrent to illegal search not otherwise provided by law."

58 Yale L.J. 151-152

"The contention that the rule is bad because it operates to release the guilty men is analytically neither more nor less than an argument that in criminal investigation the end justifies the means. If the rule allows unmerited acquittals, it does so only in the cases where the illegality is indispensable to the conviction. An after-the-fact prohibition on use of the evidence prevents convictions in no greater degree than would effective prior direction to police to search only by legal means. Exclusion is restrictive only to the same extent as a high standard of police discipline. If too many criminals are acquitted in court or released prior to trial because legal means of investigation are required by the rule, it may well be concluded that the definition of legal means is too rigid, or that the police are too lax or inefficient to find legal means of acquiring evidence. But the maintenance of existing standards by means of exclusion is not open to attack unless it can be doubted whether the standards themselves are necessary."

58 Yale L.J. 161-162

"That the exclusionary device does not function to deter the individual searcher is not proof of its inefficiency. The rule operates to hold the prosecutor and the police chief responsible for illegal search by their investigators, and to punish them, in a real sense, by marring their record of convictions and their reputation for effective and proper law enforcement. By consistently bringing pressure to bear on top officials to discipline their own organizations, exclusion might be more effective than an action against the guilty searcher, which would seldom reach above the lower ranks. Since existing deterrents which depend on prosecution and civil suit are ineffective, and since the courts have no direct means of reaching individual offenders, a sanction against their superiors seems at least a reasonable substitute for purposes of judicial administration.

"The only alternative method of judicially controlling lawlessness which seems within the courts' inherent powers, an extension of the contempt sanction to apply to deviating officials, appears at best inadequate. With the aid of statutory authorization, it might be invoked against one seeking to introduce illegally seized evidence, on the theory that he thereby affronted the dignity of the court. But the threat of the sanction would discourage the use not only of tainted evidence, but all evidence whose procurement was of even doubtful legality. The procedure would operate to free even more guilty defendants than does the exclusionary rule, and would similarly fail directly to punish the searching officer. If, on the other hand, the sanction were directed to officers violating search warrant instructions, on the theory that the violation was a contempt of court, the sanction would fail to include the great majority of illegal search cases, in which no warrant is secured at all, for these cases would never reach a court. Furthermore, the incentive would be all the greater for neglecting to use the warrant.

"Thus, of the two methods available to the courts to control illegal search, the exclusionary rule seems potentially the more effective."

58 Yale Law Jour. 161-163

"Until legislators see fit to assert control over the whole array of official crimes by the creation of independent prosecuting bodies especially designed to govern law enforcement methods, the exclusionary rule will serve a useful purpose in its limited field. At least as to investigative illegalities, which must pass review of the courts, the rule is potentially an effective deterrent. Formulation of the rule in accord with its function would help fulfill a responsibility which the courts themselves have at least temporarily assumed."

58 Yale Law Jour. 164

Monrad G. Paulsen, *Safeguards in the Law of Search and Seizure*, 52 N.W. L. Rev. 65 (1957).

"When the rules are agreed upon, what remedies ought to be available for their infraction? Two historic possibilities bear directly upon the offending officer: The criminal sanction and a civil tort action redressing illegal conduct. By the common consent of almost all who have studied the problem, these remedies just do not work. The sanctions have been available at all times and yet they are hardly ever invoked. Save in the most extreme case, what prosecutor would jeopardize his good relationship with the police by prosecuting one of them criminally? The very success of his task depends upon constant cooperation with the police. The tort remedy runs into a whole series of troubles. What are the damages in the case of an illegal search, particularly in the case of a plaintiff just convicted by the fruits of the search? Punitive damages may not be available. In the action for civil recovery, the testimony of the plaintiff will almost certainly be required which, in turn, opens up the possibility of introducing evidence of the criminal conviction to impeach credibility. In any event testimony concerning reputation will be admissible for the purpose of mitigating damages. It is important to keep in mind that the victims of police misconduct are not likely to be the most substantial citizens in the community. A person who has been convicted of crime may be deprived of his right to sue by a civil death statute, and if he is currently in custody he may have the greatest difficulty in getting out in order to testify. Even

with the best of plaintiffs, how can damages in money compensate for the injury to emotions, dignity and temper?

"Even if the tort remedy were effective, it would not be a wise one because of the excess of caution which it might instill in the police. At best tort recovery is rough justice to the defendant. Moreover, the amount recovered is proportional to the injury rather than the fault, and a very slight deviation from the norm could cause a very great injury. If tort recovery were common, policemen would do well to be exceedingly cautious—certainly an undesirable result. For this reason, I doubt the soundness of proposals for statutory damages minima if the officer must pay them.

"Our aim should be to provide a system which could tolerate isolated instances of over-zealousness were they promptly and justly corrected by means proportioned to the fault of the officer. This objective is consistent with proposals to put financial responsibility upon the units of government rather than the individual officer. We may assume that the city or state would get rid of only those officers who are especially costly because they habitually overstep the mark. Yet I cannot believe that governmental units will bear any substantial expenditure to compensate the bums, grafters, petty crooks or big-time operators who are the most probable victims of illegal police misconduct. Until some governmental unit somewhere is in fact giving adequate civil recovery for unconstitutional law enforcement, I retain my stubborn doubt whether the idea can be made to work.

"The proposal for a civil rights office, independent of the regular prosecutor, for prosecution of offenses committed by police officers has several disadvantages. First, it does not provide for compensation to the injured party. In this respect it is no better than the exclusionary evidence rule. Secondly, it either puts the sanction directly on the police officer by making him liable to prosecution for each instance of misconduct or leaves prosecution so haphazard as to fail as a deterrent. Administrative elimination of the unfit for repeated disregard of civil rights is to be preferred to the caution which might result from harsh punishment of the individual officer for a single misdeed. Thirdly, even if direct punishment is thought useful, I doubt whether many

juries will convict a policeman who has violated the civil rights of a gangster.

"Systematic discipline within the police department itself would be a splendid sanction if it were done. We just do not have examples of cities or other governmental units which have insisted that departments get rid of police who refuse to obey the search and seizure rules.

"The rule excluding the use of illegally obtained evidence is the most effective remedy against lawless law enforcement. Note I have said that it is the *most* effective remedy—not that the rule is maintained without cost nor that it is completely effective, nor that a remedy of far greater effectiveness cannot be imagined. I say only that in this very real world of ours it is the best we have. . . ."

52 N.W. L. Rev. 72-74

Osmond K. Fraenkel, *Recent Developments in the Federal Law of Searches and Seizures*, 33 Ia. L. Rev. 472 (1948).

"No survey of this subject would be complete without some discussion of the wisdom of the federal rule which permits suppression of evidence illegally seized. It has often been attacked as affording too great protection to criminals. In the Prohibition Era it was bootleggers, today it is gunmen who, it is said, are so protected. In a recent article the author recognized that the existing rule is motivated largely by a fear that in time of mass hysteria evidence obtained by unlawful searches and seizures might be used in suppression of freedom of thought, but he doubts the likelihood that the rule will survive should such a time arise and thinks its current existence too great a price to pay for this doubtful insurance. Our entire democracy, however, is built on the belief that our judges will stand up against mass hysteria. To destroy the Fourth Amendment in the fear lest this belief be unfounded and for the purpose of catching some criminals is surely to burn down the house in order to roast the pig. After all, most of the criminals let go by reason of the application of the federal rule might safely be in prison had the law enforcement

officers used more care in procuring the evidence against them."

33 Ia. L. Rev. 498

"The existing rule rests upon a double basis: that, as Justices Holmes and Brandeis long ago observed, it is dirty business for the Government to make use of evidence obtained in violation of law; that otherwise the guaranty of the Fourth Amendment ceases to have meaning. It is undeniable, of course, that illegal searches continue despite the risk that a conviction based on the evidence seized may be reversed. But that they would be much more numerous if there were no such risk can hardly be doubted. . . ."

33 Ia. L. Rev. 499

"In the last analysis the issue will be determined by what is considered to be the greater good. Is it more important to preserve the privacy of the citizen or to catch a few criminals? Those who drafted the Bill of Rights made a choice based on their reading of history. As was said by Mr. Justice Jackson:

> ". . . the forefathers . . . designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment.

"The wisdom of the founders still seems best. We can rely on the Supreme Court to give an interpretation of the term 'reasonable' which will permit careful enforcement officers to function while at the same time setting itself resolutely against any attempt to whittle away the great protection afforded by the Fourth Amendment."

33 Ia. L. Rev. 500

Wolf v. *Colorado*, 338 U.S. 25 (1949).

"Mr. Justice Rutledge, dissenting.

"'Wisdom too often never comes, and so one ought not to reject it merely because it comes late.' Similarly, one

should not reject a piecemeal wisdom, merely because it hobbles toward the truth with backward glances. Accordingly, although I think that all 'the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment,' Adamson v. California, 332 U.S. 46, dissenting opinion at page 124, 67 S.Ct. 1672, at page 1683, 91 L.Ed. 1903, 171 A.L.R. 1223, I welcome the fact that the Court, in its slower progress toward this goal, today finds the substance of the Fourth Amendment 'to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, * * * valid as against the states.' Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288.

"But I reject the Court's simultaneous conclusion that the mandate embodied in the Fourth Amendment, although binding on the states, does not carry with it the one sanction —exclusion of evidence taken in violation of the Amendment's terms—failure to observe which means that 'the protection of the 4th Amendment * * * might as well be stricken from the Constitution.' Weeks v. United States, 232 U.S. 383, 393, 34 S.Ct. 341, 344, 58 L.Ed. 652, L.R.A. 1915B, 834, Ann. Cas. 1915C, 1177. For I agree with my brother MURPHY's demonstration that the Amendment without the sanction is a dead letter. . . ."

338 U.S. 48

Mr. Justice MURPHY, dissenting.

"Imagination and zeal may invent a dozen methods to give content to the commands of the Fourth Amendment. But this Court is limited to the remedies currently available. It cannot legislate the ideal system. If we would attempt the enforcement of the search and seizure clause in the ordinary case today, we are limited to three devices: judicial exclusion of the illegally obtained evidence; criminal prosecution of violators; and civil action against violators in the action of trespass.

"Alternatives are deceptive. Their very statement conveys the impression that one possibility is as effective as the next. In this case their statement is blinding. For there is but one alternative to the rule of exclusion. That is no sanction at all.

"This has been perfectly clear since 1914, when a unanimous Court decided Weeks v. United States, 232 U.S. 383, 393, 34 S.Ct. 341, 344, 58 L.Ed. 652, L.R.A. 1915B, 834, Ann. Cas. 1915C, 1177. 'If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense,' we said, 'the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.' 'It would reduce the Fourth Amendment to a form of words.' Holmes, J., for the Court, in Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319, 24 A.L.R. 1426.

"Today the Court wipes those statements from the books with its bland citation of 'other remedies.' Little need be said concerning the possibilities of criminal prosecution. Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered. But there is an appealing ring in another alternative. A trespass action for damages is a venerable means of securing reparation for unauthorized invasion of the home. Why not put the old writ to a new use: When the Court cites cases permitting the action, the remedy seems complete.

"But when an illusory remedy this is, if by 'remedy' we mean a positive deterrent to police and prosecutors tempted to violate the Fourth Amendment. The appealing ring softens when we recall that in a trespass action the measure of damages is simply the extent of the injury to physical property. If the officer searches with care, he can avoid all but nominal damages—a penny, or a dollar. Are punitive damages possible? Perhaps. But a few states permit none, whatever the circumstances. In those that do, the plaintiff must show the real ill will or malice of the defendant, and surely it is not unreasonable to assume that one in honest pursuit of crime bears no malice toward the search victim. If that burden is carried, recovery may yet be defeated by the rule that there must be physical damages before punitive damages may be awarded. In addition, some states limit

punitive damages to the actual expenses of litigation. See 61 Harv. L. Rev. 113, 119-120. Others demand some arbitrary ratio between actual and punitive damages before a verdict may stand. See Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173, 1180-1181. Even assuming the ill will of the officer, his reasonable grounds for belief that the home he searched harbored evidence of crime is admissible in mitigation of punitive damages. Gamble v. Keyes, 35 S.D. 644, 153 N.W. 888; Simpson v. McCaffrey, 13 Ohio 508. The bad reputation of the plaintiff is likewise admissible. Banfill v. Byrd, 122 Miss. 288, 84 So. 227. If the evidence seized was actually used at a trial, that fact has been held a complete justification of the search, and a defense against the trespass action. Elias v. Pasmore (1934) 2 K.B. 164. And even if the plaintiff hurdles all these obstacles, and gains a substantial verdict, the individual officer's finances may well make the judgment useless—for the municipality, of course, is not liable without its consent. Is it surprising that there is so little in the books concerning trespass actions for violation of the search and seizure clause?

"The conclusion is inescapable that but one remedy exists to deter violations of the search and seizure clause. That is the rule which excludes illegally obtained evidence. Only by exclusion can we impress upon the zealous prosecutor that violation of the Constitution will do him no good. And only when that point is driven home can the prosecutor be expected to emphasize the importance of observing constitutional demands in his instructions to the police.

"If proof of the efficacy of the federal rule were needed, there is testimony in abundance in the recruit training programs and in-service courses provided the police in states which follow the federal rule. St. Louis, for example, demands extensive training in the rules of search and seizure, with emphasis upon the ease with which a case may collapse if it depends upon evidence obtained unlawfully. Current court decisions are digested and read at roll calls. The same general pattern prevails in Washington, D. C. In Dallas, officers are thoroughly briefed and instructed that 'the courts will follow the rules very closely and will detect any frauds.' In Milwaukee, a stout volume on the law of arrest

and search and seizure is made the basis of extended instruction. Officer preparation in the applicable rules in Jackson, Mississippi, has included the lectures of an Associate Justice of the Mississippi Supreme Court. The instructions on evidence and search and seizure given to trainees in San Antonio carefully note the rule of exclusion in Texas, and close with this statement: 'Every police officer should know the laws and rules of evidence. Upon knowledge of these facts determines whether the * * * defendant will be convicted or acquitted. * * * When you investigate a case * * * remember throughout your investigation that only admissible evidence can be used.'

"But in New York City, we are informed simply that 'copies of the State Penal Law and Code of Criminal Procedure' are given to officers, and that they are 'kept advised' that illegally obtained evidence may be admitted in New York courts. In Baltimore, a 'Digest of Laws' is distributed, and it is made clear that the statutory section excluding evidence 'is limited in its application to the trial of misdemeanors. * * * It would appear * * * that * * * evidence illegally obtained may still be admissible in the trial of felonies.' In Cleveland, recruits and other officers are told of the rules of search and seizure, but 'instructed that it is admissible in the courts of Ohio. The Ohio Supreme Court has indicated very definitely and clearly that Ohio belongs to the "admissionist" group of states when evidence obtained by an illegal search is presented to the court.' A similar pattern emerges in Birmingham, Alabama.

"The contrast between states with the federal rule and those without it is thus a positive demonstration of its efficacy. There are apparent exceptions to the contrast—Denver, for example, appears to provide as comprehensive a series of instructions as that in Chicago, although Colorado permits introduction of the evidence and Illinois does not. And, so far as we can determine from letters, a fairly uniform standard of officer instruction appears in other cities, irrespective of the local rule of evidence. But the examples cited above serve to ground an assumption that has motivated this Court since the Weeks case: that this is an area in which judicial action has positive effect upon the

breach of law; and that without judicial action, there are simply no effective sanctions presently available."

338 U.S. 42-45

People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).

"'Finally, I have no fear that the exclusionary rule will handicap the detection or prosecution of crime. All the arguments that have been made on that score seem to me properly directed not against the exclusionary rule, but against the substantive guarantee itself. The exclusion of the evidence is the only sanction which makes the rule effective. It is the rule, not the sanction, which imposes limits on the operation of the police. If the rule is obeyed as it should be, and as we declare it should be, there will be no illegally obtained evidence to be excluded by the operation of the sanction.'

"'It seems to me inconsistent to challenge the exclusionary rule on the ground that it will hamper the police, while making no challenge to the fundamental rules to which the police are required to conform. If those rules, defining the scope of a search which may be made without a warrant and the scope of a search under a warrant are sound, there is no reason why they should be violated or why a prosecuting attorney should seek to avail himself of the fruits of their violation. If those fundamental rules are open to challenge . . ., the burden is on those who challenge them to specify the modifications they deem to be desirable. I think that is a far better course than to object to the inclusion in this amendment of the one sanction which will give the constitutional provision, however it is defined, genuine meaning.' Senator Robert F. Wagner speaking before the New York Constitutional Convention of 1938. (Record of the New York State Constitutional Convention 559-560, reprinted in Allen, The Wolf Case, 45 Ill. L. Rev. 1, 19.)"

44 Cal. 2d 450 (Footnote)

"If the unconstitutional guarantees against unreasonable searches and seizures are to have significance they must be

enforced, and if courts are to discharge their duty to support the state and federal Constitutions they must be willing to aid in their enforcement. If those guarantees were being effectively enforced by other means than excluding evidence obtained by their violation, a different problem would be presented. If such were the case there would be more force to the argument that a particular criminal should not be redressed for a past violation of his rights by excluding the evidence against him. Experience has demonstrated, however, that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures. The innocent suffer with the guilty, and we cannot close our eyes to the effect the rule we adopt will have on the rights of those not before the court. 'Alternatives [to the exclusionary rule] are deceptive. Their very statement conveys the impression that one possibility is as effective as the next. For there is but one alternative to the rule of exclusion. That is no sanction at all.' (Murphy, J., dissenting in Wolf v. Colorado, supra, 338 U.S. 25, 41; see also Weeks v. United States, 232 U.S. 383, 393 [34 S.Ct. 341, 58 L.Ed. 652, L.R.A. 1915B, 834].) 'The difficulty with [other remedies] is in part due to the failure of interested parties to inform of the offense. No matter what an illegal raid turns up, police are unlikely to inform on themselves or each other. If it turns up nothing incriminating, the innocent victim usually does not care to take steps which will air the fact that he has been under suspicion.' (Jackson, J., in Irvine v. California, supra, 347 U.S. 128, 137.) Moreover, even when it becomes generally known that the police conduct illegal searches and seizures, public opinion is not aroused as it is in the case of other violations of constitutional rights. Illegal searches and seizures lack the obvious brutality of coerced confessions and the third degree and do not so clearly strike at the very basis of our civil liberties as do unfair trials or the lynching of even an admitted murderer. 'Freedom of speech, of the press, of religion, easily summon powerful support against encroachment. The prohibition against unreasonable search and seizure is normally invoked by those accused of crime, and criminals have few friends.' (Frankfurter, J., dissenting in Harris v. United States, 331 U.S. 145, 156 [67 S.Ct. 1098,

91 L.Ed. 1399].) There is thus all the more necessity for courts to be vigilant in protecting these constitutional rights, if they are to be protected at all. People v. Mayen, 188 Cal. 237 [205 P. 435, 24 A.L.R. 1383], was decided over thirty years ago. Since then case after case has appeared in our appellate reports describing unlawful searches and seizures against the defendant on trial, and those cases undoubtedly reflect only a small fraction of the violations of the constitutional provisions that have actually occurred. On the other hand, reported cases involving civil actions against police officers are rare, and those involving successful criminal prosecutions against officers are non-existent. In short, the constitutional provisions are not being enforced.

"Granted that the adoption of the exclusionary rule will not prevent all illegal searches and seizures, it will discourage them. Police officers and prosecuting officials are primarily interested in convicting criminals. Given the exclusionary rule and a choice between securing evidence by legal rather than illegal means, officers will be impelled to obey the law themselves since not to do so will jeopardize their objectives. Moreover, the same considerations that justify the privilege against self-incrimination are not irrelevant here. As Wigmore pointed out, that privilege, just as the prohibition against unreasonable searches and seizures, is primarily for the protection of the innocent. 'The real objection is that *any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself morally suffer thereby.* The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer,—that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized." (8 Wigmore on Evidence

[3d ed.] §2251, p. 309.) Similarly, a system that permits the prosecution to trust habitually to the use of illegally obtained evidence cannot help but encourage violations of the Constitution at the expense of lawful means of enforcing the law. (See Frankfurter, J., dissenting in Harris v. United States, supra, 331 U.S. 145, 172.) On the other hand, if courts respect the constitutional provisions by refusing to sanction their violation, they will not only command the respect of law-abiding citizens for themselves adhering to the law, they will also arouse public opinion as a deterrent to lawless enforcement of the law by bringing just criticism to bear on law enforcement officers who allow criminals to escape by pursuing them in lawless ways.

"It is contended, however, that the police do not always have a choice of securing evidence by legal means and that in many cases the criminal will escape if illegally obtained evidence cannot be used against him. This contention is not properly directed at the exclusionary rule, but at the constitutional provisions themselves. It was rejected when those provisions were adopted. In such cases had the Constitution been obeyed, the criminal could in no event be convicted. He does not go free because the constable blundered, but because the Constitutions prohibit securing the evidence against him. Their very provisions contemplate that it is preferable that some criminals go free than that the right of privacy of all the people be set at naught. 'It is vital, no doubt, that criminals should be detected, and that all relevant evidence should be secured and used. On the other hand, it cannot be said too often that what is involved far transcends the fate of some sordid offender. Nothing less is involved than that which makes for an atmosphere of freedom as against a feeling of fear and repression for society as a whole.' (Frankfurter, J., dissenting in Harris v. United States, supra, 331 U.S. 145, 173.) The situation presented differs only in degree from other situations where the choice must be made between securing convictions by illegal means or allowing criminals to go free. Cases undoubtedly arise where a violation of the privilege against self-incrimination, a coerced confession, the testimony of defendant's spouse, a violation of the attorney-client privilege or other privileges is essential to the conviction of the

criminal, but the choice has been made that he go unpunished. Arguments against the wisdom of these rights and privileges, just as arguments against the wisdom of the prohibitions against unreasonable searches and seizures, should be addressed to the question whether they should exist at all, but arguments against the wisdom of the constitutional provisions may not be invoked to justify a failure to enforce them while they remain the law of the land."

44 Cal. 2d 447-450

Weeks v. *United States*, 232 U.S. 383 (1914).

". . . If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. . . ."

". . . To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."

The absence of any effective alternative is evidenced by the following passage from *Nueslein* v. *District of Columbia*, 115 F.2d 691, 695 (footnote 16):

"On November 23, 1921, the following provision became law: 'That any officer * * * who shall search any private dwelling as defined in (Title 27) the National Prohibition Act * * * without a warrant directing such search * * * shall be guilty of a misdemeanor. * * *.' 42 Stat. 223, 18 U.S.C.A. §53. While the effect of this provision has been judicially recognized (Poulos v. United States, 6 Cir., 8 F.2d 120, 121, there is not one reported case where an officer has

been tried for violation. This provision was repealed on August 27, 1935 (49 Stat. 872), but at the same time there was enacted a similar statute applying to the 'enforcement of any law of the United States.' 49 Stat. 877, 18 U.S.C.A. §53a. Likewise, to date, there is not one reported case of an officer tried for violation of this provision."

Perhaps one of the strongest testimonials to the exclusionary rule's effectiveness is to be found in the fact that, while it has long been referred to as a "minority" rule, in point of fact it has now been adopted in almost one-half the states. (See 50 A.L.R. 2d 536, listing 21 states which have adopted the rule plus two others where it is partially applicable.)

APPENDIX B

Background and Effect of the California Exclusionary Rule

1. Circumstances Leading to California's Adoption of the Exclusionary Rule.

The considerations which led California to adopt the exclusionary rule are clearly stated by Mr. Justice Traynor of the California Supreme Court in the leading case of *People* v. *Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955), in which California adopted the exclusionary rule. Commenting upon the police lawlessness evidenced in the *Cahan* case, Justice Traynor observed (44 Cal. 2d 436, 437-438):

"Most of the incriminatory evidence introduced at the trial was obtained by officers of the Los Angeles Police Department in flagrant violation of the United States Constitution (4th and 14th Amendments), the California Constitution (art. I, §19), and state and federal statutes. (Pen. Code, §§146, 602; 18 U.S.C.A. §§241, 242; 42 U.S.C.A. §1983.) Gerald Wooters, an officer attached to the intelligence unit of that department testified that after securing the permission of the chief of police . . .

* * * * *

"The forcible entries and seizures were candidly admitted by the various officers. . . .

"Thus, without fear of criminal punishment or other discipline, law enforcement officers, sworn to support the Constitution of the United States and the Constitution of California, frankly admit their deliberate, flagrant acts in violation of both Constitutions and the laws enacted thereunder. It is clearly apparent from their testimony that they casually regard such acts as nothing more than the performance of their ordinary duties for which the city employs and pays them."

44 Cal. 2d 436, 437-438

Justice Traynor went on to explain the importance of preserving the constitutional right to be free from unreasonable search and seizure (44 Cal. 2d 438-439, 442):

"Thus both the United States Constitution and the California Constitution make it emphatically clear that important as efficient law enforcement may be, it is more important that the right of privacy guaranteed by these constitutional provisions be respected. Since in *no* case shall the right of the people to be secure against unreasonable searches and seizures be violated, the contention that unreasonable searches and seizures are justified by the necessity of bringing criminals to justice cannot be accepted. It was rejected when the constitutional provisions were adopted and the choice was made that all the people, guilty and innocent alike, should be secure from unreasonable police intrusions, even though some criminals should escape. Moreover, the constitutional provisions make no distinction between the guilty and the innocent, and it would be manifestly impossible to protect the rights of the innocent if the police were permitted to justify unreasonable searches and seizures on the ground that they assumed their victims were criminals. Thus, when consideration is directed to the question of the admissibility of evidence obtained in violation of the constitutional provisions, it bears emphasis that the court is not concerned solely with the rights of the defendant before it, however guilty he may appear, but with the constitutional right of all of the people to be secure in their homes, persons, and effects.

"'Of course, this like each of our constitutional guarantees often may afford a shelter for criminals. But the forefathers thought this was not too great a price to pay for that decent privacy of home, papers, and effects which is indispensable to the individual dignity and self-respect. They may have overvalued privacy, but I am not disposed to set their command at naught.' (Jackson, J., dissenting in Harris v. United States, 331 U.S. 145, 197, 198 [67 S.Ct. 1098, 91 L.Ed. 1399]; see also United States v. Di Re, 332 U.S. 581, 595 [68 S.Ct. 222, 92 L.Ed. 210].)"

44 Cal. 2d 438-439

"Meanwhile, pursuant to the suggestion of the United States Supreme Court, we have reconsidered the rule we have heretofore followed that the unconstitutional methods by which evidence is obtained does not affect its admissibility and have carefully weighed the various arguments that have been advanced for and against that rule. . . ."

44 Cal. 2d 442

After noting the various arguments which had been urged against adoption of the exclusionary rule, Justice Traynor stated the court's conclusions as follows (44 Cal. 2d 445-446):

"Despite the persuasive force of the foregoing arguments, we have concluded, as Justice Carter and Justice Schauer have consistently maintained, that evidence obtained in violation of the constitutional guarantees is inadmissible. People v. Le Doux, 155 Cal. 535 (102 P. 517); People v. Mayen, 188 Cal. 237 (205 P. 435, 24 A.L.R. 1383), and the cases based thereon are therefore overruled. We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers.

"When, as in the present case, the very purpose of an illegal search and seizure is to get evidence to introduce at a trial, the success of the lawless venture depends entirely on the court's lending its aid by allowing the evidence to be introduced. It is no answer to say that a distinction should be drawn between the government acting as law enforcer and the gatherer of evidence and the government acting as judge. [N]o distinction can be taken between the Government as prosecutor and the Government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed.' (Holmes, J., dissenting in Olmstead v. United States, 277 U.S. 438, 470 [48 S.Ct. 564, 72 L.Ed. 944, 66 A.L.R. 376].) Out of regard for its

own dignity as an agency of justice and custodian of liberty the court should not have a hand in such 'dirty business.' (See MacNabb v. United States, 318 U.S. 332, 345 [63 S.Ct. 608, 87 L.Ed. 819].) Courts refuse their aid in civil cases to prevent the consummation of illegal schemes of private litigants (Lee On v. Long, 37 Cal. 2d 499, 502-503 [234 P.2d 9], and cases cited); *a fortiori*, they should not extend that aid and thereby permit the consummation of illegal schemes of the state itself. (See Roberts, J., concurring in Sorells v. United States, 287 U.S. 435, 453 [53 S.Ct. 210, 77 L.Ed. 413, 86 A.L.R. 249].) It is morally incongruous for the state to flout constitutional rights and at the same time demand that its citizens observe the law. The end that the state seeks may be a laudable one, but it no more justifies unlawful acts than a laudable end justifies action by any member of the public. Moreover, any process of law that sanctions the imposition of penalties upon an individual through the use of the fruits of official lawlessness tends to the destruction of the whole system of restraints on the exercise of the public force that are inherent in the 'concept of ordered liberty.' (See Allen, The Wolf Case, 45 Ill. L. Rev. 1, 20.) 'Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law, it invites everyman to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.' (Brandeis, J., dissenting in Olmstead v. United States, 277 U.S. 438, 485 [48 S.Ct. 564, 72 L.Ed. 944, 66 A.L.R. 376] . . ."

44 Cal. 2d 445-446

Professor Barrett has commented as follows upon the California experience:

"The United States and the California Constitutions guarantee the 'right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures' and provide that 'no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' As a practical matter in California, however, these constitutional provisions have not served to place effective limits upon the discretion of law enforcement officers, nor have they given to the citizen judicially enforceable guarantees against illegal police searches.

"Primarily, this failure has resulted from the absence of effective means of challenging the legality of police searches. Suppose the police search a person's house illegally without finding any evidence upon which to base a criminal prosecution. What remedies are open? Clearly a civil suit for damages is available against the officer, possibly against his superior officers, and perhaps even against a surety. But except in outrageous situations where punitive damages may be sought, the possibility of a substantial recovery is slight, and difficulties of collection will normally be present. The victim of the search may also file a complaint seeking to invoke disciplinary action against, or criminal prosecution of, the offending officer. Here again relief is unlikely except in extreme cases involving violence, brutality, or blackmail. No action can be expected if the policeman's action has been pursuant to departmental policy.

"If the illegal search does result in the seizure of evidence of a crime, the person involved will find the possibilities of a substantial recovery in a civil suit or of securing disciplinary action against the officer even more remote. . . ."

Barrett, *Exclusion of Evidence Obtained by Illegal Searches—a Comment on People* v. *Cahan*, 43 Calif. L.R. 565, 568-569 (1955)

"Perhaps more important even than the vagueness of the rules is the fact that prior to the *Cahan* decision the police were under no substantial pressure to seek clarification of those rules. The issue of legality became crucial so seldom that the police had, in effect, broad discretion in determining the procedures to follow, subject only to community pressures, particularly those by the press, which rarely focused upon any but the most obvious abuses. Some law enforcement officials took advantage of the paucity of precedents to justify common police practices as being reasonable under the circumstances and, hence, not within the constitutional ban of 'unreasonable' searches and seizures. . . .

"Clearly, it is undesirable to leave the determination of the reasonableness of police procedures within the almost unchecked discretion of law enforcement officials who generally tend to value the necessities of law enforcement above the claims of individual liberty. It is no answer to say, as does the Los Angeles chief of police:

"'An experienced and trained officer does not waste his time with indiscriminate or random searches or other quests for evidence, nor is he eager to incur the wrath of his superiors and of the public, or the imposition of departmental discipline, or civil liability, by searches which are irrelevant to his duty or which have no reasonable promise of furthering the execution of his duty.'

"Nor is it an answer to say more bluntly that the police 'do not go about breaking into homes of innocent persons to search them or install microphones for they have more to do than meddle in such a matter. The governing rules must be fashioned by the community generally if a fair compromise is to be made of the claims of law enforcement and of individual liberty. And if the rules are to be effective in controlling police activity, compliance with them must be judicially enforceable.

"Hence, when the Cahan case came to the court, California was badly in need of (1) a re-examination and definition of the rules governing police searches and seizures, and (2) developing more effective remedies for police violations of the rules. . . . "

43 Cal, L. Rev. 577-578

2. Effect of the California Exclusionary Rule

Needless to say, California's adoption of the exclusionary rule was initially criticized by some of the state's law enforcement officers. However, experience with the rule demonstrated that its effects were actually beneficial. Thus, the State Attorney General, who originally opposed the adoption of the exclusionary rule, subsequently acknowledged that its overall effects had been beneficial. His conclusion is worthy of note (quoted at 9 Stanford L. Rev. 538):

"The over-all effects of the Cahan decision, particularly in view of the rules now worked out by the Supreme Court, have been excellent. A much greater education is called for on the part of all peace officers of California. As a result, I am confident they will be much better police officers. I think there is more cooperation with the District Attorneys and this will make for better administration of criminal justice."

Professor Barrett gives a more detailed account of the benefits resulting from California's adoption of the exclusionary rule (*op. cit.*, 43 Cal. L. Rev. 586-588):

"The main thrust of the exclusionary rule is against the police department which is trying to do its job of crime control but is overzealous in its methods. The principal long-run benefit to be expected from the rule is that it will force the administrators of such departments to discipline their forces to be more careful to abide by the rules. It is reasonable to assume that a police chief may forbid the use of dictographs if the evidence so secured cannot be used in court; that he may try to make the search warrant procedure work in narcotics and gambling cases if the result of just breaking in and seizing evidence will be the acquittal of the suspects. The conscientious police chief will no longer be able to rely on his own judgment as to the necessities of law enforcement; he will be forced to consider carefully judicial interpretations of the rules governing searches and seizures, and to do his best to secure com-

pliance with those rules by the individual policeman under his command. For the first time in California, the rules governing search and seizure will be crucial to those police administrators whose goal is to produce 'conviction hazards' so great that criminal operations become unprofitable.

"In the short run there is even more to be said for the Cahan decision. As has been pointed out above, the California situation was most unsatisfactory. The rules were ill-defined. There was little direct pressure upon the police to conform to the rules. In practice, police discretion in determining the reasonableness of searches was rarely subject to check. The possibilities of the situation improving appeared slight. Law enforcement groups preferred the ambiguity of seldom-litigated rules and had no real incentive to take the risks involved in seeking legislative action. And there was little evidence that other groups would take the initiative to force the police to come before the legislature. Hence, the record in California could fairly be read as suggesting that only the adoption of the exclusionary rule by the court would force a clarification, judicially or legislatively, of the applicable rules, and provide a mechanism for their enforcement. That the majority of the court in the Cahan case so read the record is shown by the assertion that experience had shown the ineffectiveness of direct remedies in suppressing illegal searches and seizures, by the reference to the difficulty of arousing public opinion in opposition to illegal activities of this type, and by the conclusion that, as a result, there is 'all the more necessity for courts to be vigilant in protecting these constitutional rights if they are to be protected at all.' It should be noted, however, that this argument for judicial adoption of the exclusionary rule as the only means of bringing public attention to focus upon the illegal search problem is not necessarily an argument for the desirability of the rule as a permanent matter—a full scale legislative consideration of the problem might end up with the elimination of the exclusionary rule. But even should this happen, the decision would have served a useful purpose.

"The experience of the first few months after the Cahan decision indicates that many of the beneficial results suggested above will occur. Law enforcement personnel have

been forced into public discussion of the problems of illegal searches. The California Attorney General has prepared and distributed a pamphlet designed for peace officers as a 'practical guide to the law of arrest, concerning searches and seizures.' He has also appointed a committee to draft proposed legislation covering arrest, search and seizure. Newspaper reports of dismissals of prosecutions suggest that the legality of police action has become an issue of major concern for the courts. And, as noted above, the supreme court has recently taken over a large group of cases for the purpose of giving an early clarification of some of the applicable rules."

APPENDIX C

Constitutional and Statutory Provisions

United States Constitution
Fourth Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution
Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution
Fourteenth Amendment

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

21 *U.S.C.*, Section 174

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of any such narcotic drug after being imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years, and in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

California Health and Safety Code Section 11500

"Except as otherwise provided in this division, no person shall possess, transport, import into this State, sell, furnish, administer or give away, or offer to transport, import into this State, sell, furnish, administer, or give away, or attempt to import into this State or transport a narcotic except upon the written prescription of a physician, dentist, chiropodist, or veterinarian licensed to practice in this State."